(1)

961581 APR 7 1997

No. _____



In The

# Supreme Court of the United States

October Term, 1996

STATE OF SOUTH DAKOTA,

*Petitioner,*

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

*Respondents,*

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITION FOR WRIT OF CERTIORARI

MARK W. BARNETT
Attorney General
State of South Dakota
*Counsel of Record*

JOHN PATRICK GUHIN
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215
*Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

196 PP

## QUESTION PRESENTED

WHETHER THE YANKTON SIOUX RESERVATION HAS BEEN DISESTABLISHED OR DIMINISHED BY VIRTUE OF AN 1894 ACT ADOPTING A "CESSION AND SUM CERTAIN" AGREEMENT BETWEEN THE YANKTON SIOUX TRIBE AND THE UNITED STATES AND BY VIRTUE OF ITS CENTURY LONG TREATMENT AS DISESTABLISHED OR DIMINISHED.

## TABLE OF CONTENTS





## TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued



MISCELLANEOUS:





TABLE OF AUTHORITIES – Continued

## PETITION FOR WRIT OF CERTIORARI

Petitioner, State of South Dakota, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on October 24, 1996.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 99 F.3d 1439 (8th Cir. 1996) and is reprinted in the Appendix. App. 1-65.

The Memorandum Opinion and Order of the United States District Court for the District of South Dakota is reported at 890 F.Supp. 878 (D.S.D. 1995) and is reprinted in the Appendix. App. 66-97.

## JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on October 24, 1996. The State's Petition for Rehearing and Suggestion for Rehearing En Banc were denied on January 6, 1997. App. 98. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Treaty with the Yankton Sioux, 1858, ratified, 11 Stat. 743 (1859). App. 99.

Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286, 314 (1894). App. 111.

## STATEMENT OF THE CASE

### A. Procedural background.

Southern Missouri Waste Management District ("District") was formed to develop a regional landfill in

southeastern South Dakota. The District selected a site on fee land owned by a non-Indian in Charles Mix County and filed an application for a state solid waste permit with the South Dakota Department of Environment and Natural Resources. A three-day administrative hearing was held before the state Board of Environment and Natural Resources. The Yankton Sioux Tribe intervened and participated in that hearing, without raising any jurisdictional claims. *See* T 303-306. At the close of the administrative hearing, the Board issued the District a solid waste permit.

The Tribe filed an action in federal court pursuant to 28 U.S.C. § 1331, inter alia, requesting injunctive relief halting construction of the District's landfill, and requesting declaratory relief that the Tribe,[1] and not the State, had jurisdiction to regulate the facility because the landfill allegedly lay within the 1858 boundaries of the Yankton Sioux Reservation. The State, brought into this action by a third-party complaint filed by the District, asserted that the 1858 reservation had been disestablished or

[1] The Tribe also asserted that the Environmental Protection Agency (EPA) had jurisdiction over the landfill based on 40 C.F.R. Part 258 and on the fact that the EPA had not delegated federal permitting and enforcement to the State over the area of the landfill. The State's solid waste plan had been approved, and federal permitting and enforcement delegated, by the EPA for all areas of the State, excluding certain "existing or former" Indian reservations. 58 Fed. Reg. 52486-52489 (Oct. 8, 1993). The district court noted, unremarkably, that the EPA retained its federal powers until it delegated them to the state or tribe. App. 94. After the entry of the district court's decision, the EPA denied the State's application for solid waste plan approval over the area at issue here. 61 Fed. Reg. 48683-48686 (Sept. 16, 1996). The State has appealed this decision in a separate action in district court.



diminished[2] as a matter of law, and de facto by treatment of the area by all governments for the last 100 years.

The district court denied the Tribe's injunctive relief, App. 90, but declared that the Yankton Sioux Reservation had not been disestablished or diminished. App. 89. The State appealed that portion of the district court's decision finding that the reservation had not been diminished or disestablished.[3]

The court of appeals affirmed, in a 2-1 decision, while acknowledging that its decision conflicted with prior decisions of the South Dakota Supreme Court. *Id.* at 26 n.19.[4] The State's Petition for Rehearing and Rehearing En Banc was denied, with Judges Magill, Loken and Bowman dissenting. *Id.* at 98.[5]

[2] The State has used the terms "disestablished" and "diminished" interchangeably to mean that the former reservation boundaries and status are terminated as in *DeCoteau v. District County Court*, 420 U.S. 425, 427-28 (1975), and that "Indian Country" status attaches only to remaining or non-extinguished "allotments," *id.* at 427 n.2; 18 U.S.C. § 1151(c), and "dependent Indian communities." 18 U.S.C. § 1151(b).

[3] The Tribe did not appeal the injunctive relief it had been denied in district court.

[4] The court of appeals simultaneously decided *United States v. Gerald Greger*, 98 F.3d 1080 (8th Cir. 1996) in which it found federal criminal jurisdiction based on the case now before this Court. Gerald Greger has indicated that he will not seek certiorari. We also note that Gerald Greger is a different person than Fred Greger who is involved in the state-federal court conflict now before this Court. *State v. Greger*, App. 125.

[5] Judge Wollman did not participate, presumably because he had three times, while a member of the South Dakota Supreme Court, found the Yankton Reservation diminished. *See State v. Williamson*, 211 N.W.2d 182, 184 (S.D. 1973) (Wollman, J. concurring specially); *see also State v. Thompson*, 355 N.W.2d 349 (S.D. 1984); *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977). Judge

Subsequent to the denial of rehearing, a unanimous South Dakota Supreme Court decided *State v. Greger*, 1997 S.D. 14, App. at 125-158, finding that the reservation had been diminished, contrary to the decision of the Eighth Circuit's divided panel.

**B. Critical historical developments.**

In 1858, the United States entered into a treaty with the Yankton Sioux Tribe by which the Tribe "cede[d] and relinquish[ed]" certain lands. *Id.* at 100. In return, the United States agreed to protect the Yankton Tribe "in the quiet and peaceable possession" of a "tract of four hundred thousand acres,"[6] *id.* at 102, and provided that no "white person" except those in certain narrow categories could reside upon this reservation. *Id.* at 108.

In 1887, Congress passed the General Allotment Act (Dawes Act). 24 Stat. 388 (1887), codified at 25 U.S.C. § 331 et seq. Pursuant to the Act, and 26 Stat. 794 (1891), tracts within the reservation were allotted to individual Yankton Indians. In 1892, Congress enacted 27 Stat. 120, 136 (1892) which authorized funds "to enable the Secretary of the Interior in his discretion to negotiate with any Indians for the surrender of portions of their respective reservations. . . . " That same year, the United States appointed the Yankton Indian Commission to negotiate for the "cession" of the surplus lands of the Yankton Indians. Ex. 605, S. Exec. Doc. No. 27, 53d Cong., 2d Sess. at 7 (1894) (hereinafter "Negotiations"). During the negotiations, the tribal and federal negotiators effectively

---

Wollman recused himself from the original panel assigned to hear the case, and took no part in the rehearing process. App. 98.

[6] The 1858 Treaty indicated the size of the reservation was 400,000 acres; after the 1858 Treaty was ratified, the United States performed a land survey and determined it actually contained 430,495 acres. T 40.



equated the pending cession agreement with the earlier 1858 cession which had resulted in the termination of tribal authority and interest in a large block of the territory of the Tribe, *see, e.g. id.* at 54, 56, 58, 59, 66, 83. The tribal and federal negotiators also equated the pending cession with the contemporaneous Lake Traverse cession, *see id.* at 54, 68, 71, which resulted in disestablishment. *See DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975).

A majority of the male tribal members and the Commission ultimately reached an agreement. The first article of the Agreement provided that the Tribe did "hereby cede, sell, relinquish, and convey" to the federal government "all their claim, right, title and interest" in "all the unallotted lands" of the "reservation set apart to said Indians as aforesaid." App. 112-113. The majority below indicated that approximately 200,000 acres were unallotted and ceded at this time.[7] App. 9. The Tribe did not itself retain a land base. Article I, App. 111-112; *see also*, Art. VIII, App. 116. Article II of the cession agreement provided for payment of a sum certain of "$600,000" to the Tribe. *Id.* at 113. Article XVII of the Agreement prohibited the sale of liquor on the ceded lands, despite the fact that existing statutory law already prohibited the introduction of alcohol into Indian country. *Id.* at 120. Article XVIII, on which the Tribe's argument has been poised, provided that nothing in the present agreement should be construed "to abrogate the treaty of April 19th, 1858," that "all provisions of the said treaty of April 19th, 1858 shall be in full force and effect, the same as though this agreement had not been made" and that "the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858." *Id.*

---

[7] The majority relied on the Court of Claims' figure of 200,000 acres; other evidence indicates 168,000 acres were unallotted and ceded. *See, e.g.*, Negotiations, at 7.

In the 1894 Act ratifying the 1892 agreement, Congress included a provision which provided that the "sixteenth and thirty-sixth sections in each Congressional township . . . shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota." *Id.* at 123. During the debates, congressmen indicated that the lands in this and other agreements would be returned to the "public domain," *see* Ex. 669, 53 Cong. Rec. 6425 (1894) (Rep. McRae); *id.* at 6426 (Rep. Hermann). Another congressman stressed that Congress should honor the 1892 agreement and the others made at the time as "treaties, just as all other cessions of land have been." *Id.* at 8268 (Rep. Pickler).

In 1895, President Cleveland opened the reservation. His Proclamation stated that the Yankton Indians had "ceded, sold, relinquished and conveyed to the United States all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation" as set apart by the 1858 agreement. 29 Stat. 865 (1895).

After the Presidential Proclamation, the State assumed civil and criminal jurisdiction over the opened lands. The majority acknowledged, for example, that "state government has quite consistently exercised various forms of governmental authority over the opened lands on the Yankton reservation. State courts have exercised criminal jurisdiction over Indians on non-trust lands without objection from the tribe until recently." App. 38. The majority also found "the Tribe presented *no* evidence that it attempted until recently to exercise civil, regulatory, or criminal jurisdiction over nontrust lands" (emphasis added). App. 39. Similarly, the dissent found that "South Dakota has exercised civil and criminal jurisdiction over tribal members in the ceded land for the last century." *Id.* at 62. *See also* T 318, 330-331.

At present, nine percent of the area within the 1858 boundaries is trust land, *see* App. 42, n.25; as illustrated



by the map at App. 159[8] and 1990 federal census data indicates that non-Indians constitute over two-thirds or 68 percent of the population. *Id.* at 42; Ex. 614.

**C. Proceedings below.**

The district court's opinion finding the reservation not to have been diminished relied almost entirely on Article XVIII. The district court found that Article XVIII, when read with the "clear cession and sale clauses of Articles I and II, creates an internal inconsistency in the 1892 Agreement." *Id.* at 81-82. The district court found itself bound to construe the "ambiguity in favor of the Tribe" and thus found that the effect of Article XVIII was to "incorporate by reference the exterior boundaries of the Yankton Sioux Reservation as set out in the 1858 treaty." *Id.* at 82. The district court nonetheless found that the Tribe had presented "*no evidence* that, since 1894, the Tribe has exercised civil jurisdiction, particularly environmental regulation, over Indians or non-Indians beyond its trust lands" (emphasis added). *Id.* at 88.

A divided court of appeals affirmed. The most critical facet of the majority's opinion is its treatment of the "cession and sum certain" arrangement of Articles I and II of the Yankton Agreement. This Court has found that such an arrangement creates an "almost insurmountable presumption," *Solem v. Bartlett*, 465 U.S. 463, 470-71 (1984), or a "nearly conclusive presumption," *Hagen v. Utah*, 510 U.S. 399, 411 (1994) of diminishment. As pointed out by the dissenting opinion, however, "the

---

[8] App. 159 is a reduced reproduction of a land status map generated by the BIA after the district court's decision. A different coloration has been used here for clarity. The original map was introduced as Exhibit 906 in the *Greger* litigation in state court. (We understand that the phrase "Tribal fee-to-trust land" used in the Legend (the purple lands) was intended to denote lands owned by the tribe in fee for which trust applications had been made.)

majority never acknowledges that the presumption of diminishment exists, nor does it hold that the presumption of diminishment has somehow been rebutted." App. 47-48.

Relying on a prior decision of the circuit court as to a North Dakota reservation, the majority first implied that the Article I "cession" language, standing alone, did not evince a clear congressional intent to disestablish. *Id.* at 14. The majority then turned to Article II's "sum certain" language and found that its history did not indicate an intent to diminish the reservation. *Id.* at 14-16.

Having reduced the "cession and sum certain" language of Articles I and II to insignificance, the majority noted that "the signatories to the 1892 agreement state that Article XVIII has the strongest savings clause of any unallotted land sale agreement between a tribe and the government." *Id.* at 16. The majority omitted all reference to South Dakota's argument that diminishment had been acknowledged by this Court despite equally strong savings language in two agreements with the Crow Tribe. *See DeCoteau*, 420 U.S. at 439 n.22; *Montana v. United States*, 450 U.S. 544, 548 (1981). The majority held that because the language of Article XVIII was "unusually expansive," the other sections of the 1892 agreement "should be read narrowly to minimize any conflict with the 1858 treaty." App. 17. The majority concluded that

> [a]lthough the cession language in Articles I and II could be viewed as describing a transfer of tribal governmental authority as well as land, thereby changing the 1858 treaty boundaries, the narrower reading is that the 1894 act simply authorized the conveyance of real property.

*Id.* at 20. The majority rejected the State's argument that the specific provisions within Article XVIII for the continuation of "annuities under said treaty of April 19, 1858" indicated that a narrower reading was to be given to the Article. *Id.* at 17-18.



The majority in addition rejected the State's arguments, based on parallel legal conclusions adopted in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), that diminishment was indicated by a provision in the Yankton Agreement regarding the sale of liquor on ceded lands, *see Rosebud*, 430 U.S. at 613, *contrast* App. 23-24, and by a provision in the Act adopting the Yankton Agreement which reserved Sections 16 and 36 of the ceded lands as school land. *See Rosebud*, 430 U.S. at 599-601, *contrast* App. 24-25.

The majority rejected, by footnote, the State's arguments based on the treatment of the reservation diminished by this Court in *Perrin v. United States*, 232 U.S. 478 (1914) and by the court of appeals and the court of claims. See, App. 25, n.18. The majority cited three of the four cases of the South Dakota Supreme Court finding disestablishment but summarily rejected their analysis in a one-paragraph footnote. *Id.* at 26, n.19. The majority labeled the contemporaneous and recent history presented in the record as not " 'fully consistent with an intent to terminate the reservation. . . . ' " App. 39; *see also id.* at 40-43 (finding no de facto diminishment).

Judge Magill dissented. Relying upon *Solem*, 465 U.S. at 470-71 and *DeCoteau*, 420 U.S. at 447-478, Judge Magill found that because "Articles I and II of the 1894 Act contain language of cession of land for a sum certain, they create an almost insurmountable presumption of diminishment." App. 47. The dissent stated that the task of the court was to determine if the proponent of continued reservation status had "successfully rebutted this presumption of diminishment," *id.* (footnote omitted), and found that the

> majority . . . never makes this critical analysis. Indeed, the majority never acknowledges that the presumption of diminishment exists, nor does it hold that the presumption of diminishment has somehow been rebutted.

*Id.* at 47-48 (footnote omitted).

The dissent rejected the majority's analysis of Articles I and II and its inappropriate reference to legislative history which did not, in any event, support the majority's argument. The dissent found that the majority had failed "to recognize that the language actually chosen by Congress is the best indication of its intent." *Id.* at 49. The dissent asserted that the "majority seems to suggest that the plain meaning of a statute must be rejected unless positively supported by its legislative history. This approach is simply not correct." *Id.*

The dissent also rejected the majority's construction of the Article XVIII savings clause, finding that this Court had found diminishment "despite similarly 'strong' – if less verbose – savings clauses" in *Montana*, 450 U.S. at 548, and *DeCoteau*, 420 U.S. at 446. App. 50, n.31. The dissent found that literal interpretation of Article XVIII would "eviscerate the 1894 Act, nullifying its chief provisions and contradicting its entire purpose." *Id.* at 51. In particular, the Treaty of 1858 provided that the Yankton Indians would not be dispossessed of their lands and white settlers would not be allowed within the 1858 boundaries; the "undisputed purpose" of the 1894 agreement however, was to obtain Yankton Indian lands for white settlement, *id.* at 53, and to allow white persons on those lands. *Id.* at 52-53.

The dissent rejected the majority's approach to the ambiguity issue, relying upon this Court's holding in *DeCoteau*, 420 U.S. at 447, that " *'[a] canon of construction is not a license to disregard clear expressions of tribal and congressional intent.'* " App. 54, n.33 (emphasis by dissent). Because there was "no ambiguity in Articles I and II," Article XVIII could not overcome the clear expression of intent to diminish in Articles I and II. *Id.*

The dissent concluded that the majority's interpretation of Article XVIII was based "neither on the text – which referred only to annuities – nor the legislative history of the 1894 Act, and *has as its source only*, as best I can discern, *a single-minded desire to avoid diminishment at*



*all costs.*" *Id.* at 55-56 (emphasis added). Based on the specific reference to annuities in Article XVIII, the legislative history and testimony of the historian retained by the Tribe, the dissent concluded that the purpose of Article XVIII was to protect annuities. *Id.* at 51-56.

The dissent found support for diminishment in Article XVII of the 1894 Act, noting that the inclusion of the liquor prohibition was indicative of diminishment "because standing law had already prohibited the introduction of alcohol into Indian country" (*id.* at 56); in the reservation of Sections 16 and 36 of the congressional townships for common schools (*id.* at 57-58); and in "striking passages" in the legislative history which indicated the "termination of tribal governance." *Id.* at 59.

Finally, the dissent found substantial support for diminishment in the jurisdictional history of the area, noting the area's treatment as nonreservation "for the past century" by the state courts, *id.* at 62, and the failure of the Tribe to exercise jurisdiction beyond its trust lands. *Id.* The dissent also noted the longstanding treatment of the federal courts of the area as diminished, beginning with this Court's 1914 decision in *Perrin*. *Id.* at 63-64.

Following the decision of the court of appeals and the denial of rehearing and rehearing en banc, the South Dakota Supreme Court issued its decision in *Greger*, *id.* at 125-158. In that case, a unanimous South Dakota Supreme Court found the reservation to have been diminished, notwithstanding the very recent decisions of the lower federal courts in the case at bar. The *Greger* decision is set out at App. 125-158.

## REASONS FOR GRANTING THE WRIT

The 1894 Act contains express language providing for the cession of land and the payment of a sum certain for that land. This Court's precedents directly hold that such "cession and sum certain" language creates a "nearly conclusive presumption" or an "almost insurmountable presumption" of diminishment. The Eighth Circuit below

failed to apply or even acknowledge that presumption. As a consequence, that decision squarely conflicts with prior and subsequent Yankton disestablishment decisions of the South Dakota Supreme Court, with this Court's disestablishment jurisprudence and with this Court's own 1914 *Perrin* opinion. The Petition should be granted to resolve those conflicts, which have left the regulatory authority over Indians and non-Indians on roughly 390,000 acres of South Dakota lands in an uncertain state.

## I

## THE DECISION OF THE DIVIDED PANEL OF THE COURT OF APPEALS SQUARELY CONFLICTS WITH THE SUBSEQUENT DECISION OF THE UNANIMOUS SOUTH DAKOTA SUPREME COURT ON AN IMPORTANT QUESTION OF FEDERAL LAW.

As the divided opinion below recognized, its decision put the court of appeals in conflict with prior decisions of the South Dakota Supreme Court. App. 26, n.19. For example, in *Wood v. Jameson*, 130 N.W.2d 95, 99 (S.D. 1964), the South Dakota Supreme Court held that "the purpose of Congress was to disestablish the [Yankton] reservation." *See also State v. Thompson*, 355 N.W.2d 349, 350-51 (S.D. 1984); *State v. Winckler*, 260 N.W.2d 356, 360 (S.D. 1977); *State v. Williamson*, 211 N.W.2d 182, 183-84 (S.D. 1973); *See also* Dissent, App. 61, n.38.

Subsequent to the decision of the divided court of appeals, a unanimous South Dakota Supreme Court again found that the Yankton Sioux Reservation had long been diminished. *State v. Greger*, App. 125-158. The South Dakota Supreme Court's decision focused on the identical issue before the courts below – whether the reservation had been diminished. The State Supreme Court "thoroughly reviewed" the proceedings in the federal case



now before this Court,[9] but did not consider itself bound by the federal decisions under *Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1989). *Greger*, App. 135, n.5. The South Dakota Supreme Court concluded at *Greger*, App. 157-158:

> For over one hundred years, federal and state authorities have treated the Yankton Sioux Reservation as diminished. . . . The United States Supreme Court in 1914 referred to the very area now in question as no longer part of the reservation, and in four separate opinions, this Court concluded diminishment occurred. Statutory language, contemporary negotiations, land ownership, population patterns and "jurisdictional history" all support diminishment. After more than a century, no other expectation is reasonable – using the Supreme Court's "clean analytical structure," the evidence is clear: the Yankton Reservation has been diminished.

This Court has explained that "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). *See* Supreme Court Rule 10(a). The resolution of a conflict relating to the existence of a reservation has repeatedly constituted a compelling argument in favor of granting certiorari. *See, e.g., Hagen*, 510 U.S. at 409 ("We granted certiorari . . . to resolve the direct conflict . . . "); *Solem*, 465 U.S. at 466 ("Because the Supreme Court of South Dakota has issued a pair of opinions offering a conflicting interpretation . . . we granted certiorari"); *DeCoteau*, 420

---

[9] The State Supreme Court had before it the same exhibits and testimony put before the federal district court and a few additional exhibits added in the state court proceeding. *Greger*, App. 135, n.5.

U.S. at 430-31 ("We granted certiorari . . . to resolve the conflict . . . ).[10]

The divided opinion creates profound difficulties for all of the governmental agencies attempting to administer the area and for all those who live in the area (over two-thirds of whom are non-Indians). Less than ten percent of the area even potentially constituted "Indian country" as trust land[11] under 18 U.S.C. § 1151(c) prior to the decision of the court of appeals. App. 42, n.25. The remaining ninety percent of the area was assuredly not "Indian country." The divided opinion below creates conflicts with regard to at least the ninety percent non-Indian land constituting approximately 390,000 acres.

If the divided decision of the panel of the Eighth Circuit correctly states the law, 100 percent of the area will be subject to the subtle and often elusive permutations of federal civil and criminal Indian law which follow the designation of an area as a "reservation"; if, on the other hand, the state courts are correct in affirming their own century-long jurisdiction, the status quo would be retained and "Indian country" status would attach only to at most nine percent of the area as "allotments" or as "dependent Indian communities." *DeCoteau*, 420 U.S. at 427, n.2.

---

[10] Indeed, in *Hagen*, the United States supported the grant of certiorari to deal with a state-federal court diminishment conflict and did so in the face of procedural and other difficulties not presented here. Brief for the United States as Amicus Curiae, On Petition for a Writ of Certiorari to the Supreme Court of Utah at 5, 12-14, and n.10, *Hagen v. Utah*.

[11] Not all "trust land" constitutes an "allotment" or "Indian country" under 18 U.S.C. § 1151(c). *See United States v. Stands*, 105 F.3d 1565, 1571-1572 (8th Cir. 1997). *See also*, n.2, *supra*.



## II

## THE DIVIDED OPINION CONFLICTS WITH THIS COURT'S DIMINISHMENT JURISPRUDENCE.

Because of the overwhelming importance of the issue of reservation status to all affected citizens and governments, it is critical that the lower courts scrupulously adhere to this Court's " 'fairly clean analytical structure,' " regarding diminishment questions. *Hagen*, 510 U.S. at 410-411.

In *Hagen*, 510 U.S. at 411, this Court, noting that it would not lightly find diminishment and that statutes should be construed liberally in favor of the Indians, identified three primary areas of inquiry. According to the Court:

> The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands.

*Id. Hagen* also noted its reliance upon "historical context" and " 'on a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant. . . . ' " *Id.* The divided court below failed to follow this Court's analytical structure and precedents in any meaningful fashion.

### A. The opinion below directly conflicts with this Court's precedent regarding "cession and sum certain" language.

This Court, in *DeCoteau*, 420 U.S. at 445, firmly established the principle of law that "cession and sum certain" language is "precisely suited" to termination of a reservation. Later cases have emphasized this principle, in exceptionally strong terms, and have found that "cession and sum certain" language creates an *"almost insurmountable presumption"* of diminishment. *Solem*, 465 U.S. at 470-71. In particular, this Court has held:

> Explicit reference to cession or other language evidencing the present and total surrender of all

> tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands. (Citations omitted.) *When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished.*

*Solem*, 465 U.S. at 470-71 (emphasis added). This Court recently reiterated that binding rule of law in *Hagen*, 510 U.S. at 411, when it found that the use of cession and sum certain language creates a *"nearly conclusive presumption"* of diminishment. In addition, this Court has found that such language is "[a]t one extreme" of language which indicates diminishment. *Solem*, 465 U.S. at 469, n.10.

The "operative language," *Hagen*, 510 U.S. at 412, of the 1894 Yankton Act contained the following provisions:

> Article I. The Yankton tribe of Dakota or Sioux Indians hereby *cede, sell, relinquish, and convey* to the United States *all their claim, right, title, and interest in* and to *all the unallotted lands* within the limits of the reservation set apart to said Indians as aforesaid.
>
> Article II. In consideration for the lands *ceded, sold, relinquished, and conveyed* to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians *the sum of six hundred thousand dollars ($600,000)*, as hereinbefore provided for.

App. 112-113. (emphasis added) Articles I and II of the 1894 Act contain language of "cession" of land for a "sum certain" and therefore create the "nearly conclusive presumption," *Hagen*, 510 U.S. at 411, or the "almost insurmountable presumption" of diminishment. *Solem*, 465 U.S. at 470-71. *See DeCoteau*, 420 U.S. at 445.

As the dissent pointed out, the task of the court below, upon recognition of the presumption, was "to determine if the proponents of a continued reservation



status for the ceded lands have successfully rebutted this presumption of diminishment." App. 47 (footnote omitted). The majority failed to make this "critical analysis" however, and in fact "never acknowledges that the presumption of diminishment exists nor does it hold that the presumption of diminishment has somehow been rebutted." Dissent, App. 47-48 (footnote omitted).[12] The failure of the majority to adhere to this Court's unequivocal precedents with regard to the creation of the "almost insurmountable presumption" of diminishment amply justifies the grant of certiorari in this case. *Cf. South Dakota v. Bourland*, 508 U.S. 679, 691-92 (1993).

The majority, instead of adhering to this Court's "cession and sum certain" holdings, engaged in a "deconstruction" of Articles I and II. First, instead of construing the two terms together as this Court has indicated is appropriate, *see Solem*, 465 U.S. at 470-71, the majority separated the two terms. Second, the majority essentially ignored the "cession language," App. 13, assigning it virtually no importance.[13] The majority thus ignored not only *Hagen*, *Solem*, and *DeCoteau*, but also *Rosebud*, 430 U.S. at 597 in which this Court found that "cession"

---

[12] The dissent points out that the majority's "two passing references" to the presumption are made as "mere restatement[s] of the appellant's argument." App. 47, n.30. The dissent also correctly found that: "Nowhere in its opinion does the majority acknowledge that the appellant is correct that this almost insurmountable presumption of diminishment was created by Articles I and II." *Id.*

[13] The majority's reliance on *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir. 1987), *vacated in part on other grounds on reh'g en banc*, 863 F.2d 572 (8th Cir. 1988), *cert. denied*, 493 U.S. 1047 (1990), is unavailing for *Grey Bear*, while including "cession language," did *not* include "sum certain" language and this distinction was critical in *Grey Bear* itself. *Grey Bear*, 828 F.2d at 1290. *See* Dissent, App. 48-49; *State v. Greger*, App. 142, n.7.

language *alone*, without the addition of sum certain language, was " 'precisely suited' to disestablishment."

Third, the majority "similarly discards the importance of Article II," Dissent, App. 49, and its "sum certain" language. The flaw in the majority opinion is its failure to assign primary importance to the language actually used by Congress. Instead of recognizing that the language was "precisely suited" to disestablishment, the majority looked to legislative history to determine its meaning. *See id.* at 14-16. As stated by the dissent, the majority thus incorrectly found that "the plain meaning of the statute must be rejected unless positively supported by its legislative history." *Id.* at 49. As the dissent concluded, however, even this investigation of legislative history yielded "nothing" which "betrays" an intent other than to diminish. *Id.*

The majority's apparent argument with regard to Article II sum certain language is that evidence that a tribe sought definite and substantial financial return for its lands is not supportive of diminishment. *See id.* at 15-16 (citing *DeCoteau*, 420 U.S. 447-48). The majority misreads *DeCoteau*, 420 U.S. at 448, which indicates that an agreement which did *not* provide for definite payment did not diminish but that diminishment *was* accomplished by the act which "vests in the tribe a sum certain – $2.50 per acre – in payment for the express cession and relinquishment of 'all' of the tribe's 'claim right, title and interest' in the unallotted lands." *See also* general discussion of this point at *Rosebud*, 430 U.S. at 598, n.20.

Analysis of the historical record yields additional evidence that "cession and sum certain" language, as used here, *was* intended to disestablish the reservation. For example, congressmen debating the ratification of the 1892 agreement indicated the lands in question would become part of the "public domain." *See* Ex. 669, 53 Cong. Rec. 6425 (1894) (Rep. McRae); *id.* at 6426 (Rep. Hermann). *See, Hagen*, 510 U.S. at 412-415. Further, the Indians and federal negotiators, Negotiations at 54, 56,



58, 59, 66, 83, effectively equated the 1892 cession with the 1858 cession made by the same Yankton Indians. Because the Indians and non-Indians alike knew the effect of the 1858 cession agreement, both the tribal members and the federal negotiators certainly knew that the 1892 cession agreement would diminish the reservation. The negotiators and the Indians also regularly equated the 1892 cession with the Lake Traverse cession, *see, e.g., id.* at 54, 68, 71; it cannot be disputed that this agreement disestablished the Lake Traverse Sisseton Reservation. *DeCoteau*, 420 U.S. at 427-28.

### B. The opinion of the court below conflicts with this Court's treatment of savings clauses.

The divided panel below relied primarily upon a savings section to find that the reservation had not been diminished. *See* App. 16-21. Article XVIII, as set out at App. 120, states as follows:

> Article XVIII: Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

#### 1. Diminishment has been found by this Court in the two cases in which language at least equal in strength to the Yankton language was employed.

As the dissent noted, this Court has "found diminishment despite similarly 'strong' – if less verbose – savings clauses in two other allotment-era statutes." Dissent,

App. 50, n.31. An agreement with the Crow Tribe at 22 Stat. 42 (1882), states that: "all the existing provisions of May seventh, eighteen hundred and sixty-eight, shall continue in force." This language is at least as powerful as that of the Yankton agreement but this Court, in *Montana*, 450 U.S. at 548, referred to this act as one of four which "reduced the reservation to slightly fewer than 2.3 million acres." Similarly, this Court noted diminishment with regard to an Agreement found at 26 Stat. 989, 1039-1040, § 31, Act of March 3, 1891, which stated:

> That all existing provisions of the Treaty of May 7th, Anno Domini eighteen hundred and sixty-eight, and the agreement approved by act of congress dated April eleventh, eighteen hundred and eighty-two, shall continue in force.

Despite this language, this Court acknowledged that this Agreement also diminished the Crow Reservation. *DeCoteau*, 420 U.S. at 439, n.22, 446; *Montana*, 450 U.S. at 548. While neither *Montana* nor *DeCoteau* directly set forth the savings language of the two agreements, this Court's opinions in these two cases strongly indicate diminishment. The majority below, however, did not cite or deal with this Court's opinions in this respect.

**2. The savings section is internally ambiguous.**

In assigning the savings section in this case unprecedented force, the majority failed to credit the internal ambiguity of the section itself – an ambiguity which makes a broad construction of the section unavailable. Article XVIII states both that "all provisions of the said 1858 treaty of April 19th, 1858, shall be in full force and effect" and *also* that the annuity provisions "under the said treaty of April 19, 1858" remain in effect. App. 120. The section therefore gives inconsistent signals as to what is preserved; i.e., if the language were actually intended to protect "all" provisions of the 1858 agreement, certainly the 1858 annuity provisions would be protected.



Furthermore, if a literalistic interpretation of the first portion of the savings section is adopted, it effectively negates the 1894 agreement. Article 4 of the 1858 Treaty guaranteed the tribe "quiet and peaceable possession" of 400,000 acres "for their future home." App. 102. Article 10 of the 1858 agreement excluded settlement by any "white person" on the reservation, except certain narrow categories. *Id.* at 108. Indeed, under the literalistic interpretation of the 1894 savings clause, *the entirety of the 1858 Treaty remains in effect, and the cession of land provided for by Articles I and II of the 1894 Act is negated.*

The canons of construction do not allow an ambiguous Article XVIII to overcome the crystal clear provisions of Articles I and II. This Court held in *DeCoteau*, 420 U.S. at 447, that a "canon of construction is not a license to disregard clear expressions of tribal and congressional intent." *See also South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986); *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 766-770 (1985). As this Court has definitively established, "cession and sum certain" language identical to that used in the 1894 Yankton agreement constitutes a clear and unequivocal expression of tribal and congressional intent to disestablish. Under *DeCoteau*, *Catawba* and *Klamath*, the canons of construction do not allow the ambiguous language of Article XVIII to overcome the definitively established expression of tribal and congressional intent created by the "cession and sum certain" language of Articles I and II. *See* Dissent, App. 54, n.33.

Finally, the effect of the majority opinion is to negate the "operative language," *Hagen*, 510 U.S. at 512, of Articles I and II, in favor of the savings language. *Hagen*, 510 U.S. at 514, indicated the priority to be given to "operative language" in construing a "congressional purpose to terminate reservation status." The majority's failure to assign the correct priority to the "operative language" of Articles I and II infected its decision with error.

**3. The majority failed to properly deal with the ambiguity of Article XVIII.**

The proper mode of analysis of the ambiguous text of Article XVIII is to examine its history and its place with regard to the remainder of the Agreement, *see* Dissent, App. 51-56. An analysis of the legislative history of the article reveals no support for the construction of the majority. The dissent states,

> nowhere in Article XVIII nor in the legislative history of the 1894 Act is there any suggestion that the 1858 boundaries were to remain intact, nor that the tribe was to have continuing authority over ceded lands.

*Id.* at 54 (footnote omitted.) *See also Greger*, App. 149.

The history of the article reveals that its focus and intent were to preserve annuities, as set forth in the language of the article. The historian retained by the Tribe testified, for example, that "it's my opinion the Yanktons would have believed that the government might cut off the annuities, and that would have been disastrous." T 54-55. *See* Dissent, App. 55; *Greger*, *id.* at 147-148. Furthermore, the report of the negotiators to Congress regarding Article XVIII specifically stated that "nothing in the agreement shall be construed to abrogate the Treaty of April 19, 1858 and that the Yankton Indians shall continue to receive their annuities under said treaty." Negotiations at 4. Annuities were the only claims thought important enough to specifically include in the agreement or in the commentary to the agreement.[14] In sum, nothing in the history of Article XVIII supports the

---

[14] As the South Dakota Supreme Court has implied, the article may well have been broad enough to encompass the other monetary claims raised by the Yankton Indians at that time. *Greger*, App. 148-149. *See, e.g.*, Negotiations at 21 ("The Indians, . . . presented a long list of claims and grievances. They claim they had not received their dues under the Treaty of 1858. . . . "); *id.* at 55 (tribal member's claims relating to "this [1858] treaty," Pipestone and other claims); *id.* at 58, 74.



sweeping and unprecedented interpretation given it by the majority below.

**4. The majority failed to address whether the savings section overcame the "almost insurmountable presumption" of diminishment.**

Finally, we note the significant error of the majority in failing to set the ambiguous savings clause against the "almost insurmountable presumption," *Solem*, 465 U.S. at 470-71, or the "nearly conclusive presumption," *Hagen*, 510 U.S. at 411, of diminishment established by this Court. The result is, in any event, clear. The ambiguous savings clause cannot overcome the powerful presumption of diminishment, especially when that presumption is aided, as here, by other substantial evidence.

**C. The decision below conflicts with this Court's conclusion that the "justifiable expectations" of residents of the area should be honored.**

This Court has strongly indicated that it gives substantial deference to the "justifiable expectations" of people living in the area in determining whether diminishment has occurred. *See Hagen*, 510 U.S. at 420-21; *Rosebud*, 465 U.S. at 604-605. It is appropriate that this should be so, for it cannot be the function of the law to lightly upset century old jurisdictional arrangements. In determining the nature of the "justifiable expectations" of the inhabitants of the area, this Court has looked to the jurisdictional history, land ownership pattern and population of the area. All three factors argue strongly both for de jure, *Rosebud*, 430 U.S. at 603-605, and de facto, *Solem*, 465 U.S. at 471, disestablishment.

**1. Jurisdictional history.**

In *Rosebud*, 430 U.S. at 603, this Court indicated, with respect to jurisdictional history, that the "single most salient fact is the unquestioned actual assumption of state jurisdiction over the unallotted lands in Gregory County since the passage of the 1904 Act. . . . " As in *Rosebud*, the State here immediately assumed jurisdiction over the unallotted lands in the former Yankton Reservation area after the President's Proclamation. Even the majority below found that state government

> has quite consistently exercised various forms of governmental authority over the opened lands on the Yankton reservation. State courts have exercised criminal jurisdiction over Indians on nontrust lands without objection from the tribe until recently.

App. 38. Similarly the dissent, *id.* at 62, found that "South Dakota has exercised civil and criminal jurisdiction over tribal members in the ceded lands for the past century." *See also Greger, id.* at 154-155: "Since 1895, the year the reservation was opened, South Dakota courts have consistently maintained, without intervention by federal or tribal authorities, civil and criminal jurisdiction within the former reservation boundaries."

State jurisdiction has been, moreover, exclusive. The federal courts have not exercised criminal jurisdiction over nonmembers or non-Indians on the nontrust lands of the alleged reservation. *See, e.g.*, Testimony of Tribal Chairman Drapeau. T 318, 330-331; *Greger*, App. 154. Indeed, the United States admits that as late as 1985, it had stated in a brief to the Eighth Circuit Court of Appeals that the "reservation had been diminished by the 1894 treaty." *See* Brief of the United States as Amicus Curiae in Support of Plaintiffs-Appellees, *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, No. 95-2647, at 18, n.8. Similarly, the federal courts have consistently treated the area as disestablished. *See Weddell v. Meierhenry*, 636 F.2d 211, 213, n.2 (8th Cir. 1980); *Forman v.*



*United States*, 256 F.2d 766, 767 (8th Cir. 1958); *Cihak v. United States*, 232 F. 551 (8th Cir. 1916). The court of claims in 1980 stated "the 1892 agreement changed those boundaries by the cession at issue in this case." *Yankton Sioux Tribe v. United States*, 623 F.2d 159, 165 (Ct. Cl. 1980). Indeed, the same district court which decided the case now before this Court entered a decision in 1995 treating the Yankton reservation as disetablished and that decision was affirmed, per curiam, by the court of appeals. *Primeaux v. Lee*, Civ. 94-4022, (D.S.D. June 14, 1995), *aff'd.*, No. 95-2943 (8th Cir. Jan. 3, 1996) (per curiam). (Unpublished opinions lodged with Clerk). See also *Primeaux v. Lee*, 74 F.3d 1243 (8th Cir. 1996) (Table).

Finally, the *Tribe* has not exercised civil or criminal jurisdiction on the nontrust lands of the area for the last century. As the majority stated, "The tribe presented no evidence that it has attempted until recently to exercise civil, regulatory, or criminal jurisdiction over nontrust lands." App. 39. *Indeed, neither of the tribe's own constitutions claims jurisdiction over non-Tribal lands.* The latest constitution, adopted in 1962 by tribal members after examination of other tribal constitutions, claimed territorial effectiveness only as to "all original Tribal lands now owned by the Tribe under the Treaty of 1858." Ex. 652; Art. IV, § 1. *See* App. 39. Thus the tribe, as of today, limits its constitutional assertion of jurisdiction to *tribal lands only* and claims no external boundaries. The effect of the ruling of the court below is to grant the tribe far greater jurisdiction than it claims in its own BIA-approved constitution. No precedent has been cited to support such an anomalous result.[15]

---

[15] In both *DeCoteau*, 420 U.S. at 443, and *Rosebud Sioux Tribe*, 430 U.S. at 616 n.1 (Marshall, J. dissenting), the tribe claimed reservation boundaries based in part on assertions in their own constitutions. Even *with* such provisions, the Tribe's claims were *rejected*. This makes the ruling below all the more remarkable.

**2. Land ownership and population.**

The district court found that "[w]hite settlers rapidly entered and settled the opened areas of the reservation." App. 86. In fact, by 1930, the Yankton Indians owned only 43,358 acres and had divested themselves of ownership of approximately 90 percent of the lands or 387,047 acres. *Greger*, App. 156. As of today, the United States holds *less than nine percent* of the acreage within the purported reservation in trust. *Id.* at 42, n.25; *Greger*, *id.* at 156. See Map, App. 159. Furthermore, there are now six state chartered municipalities within the area claimed to be a reservation: Wagner, Lake Andes, Pickstown, Dante, Marty, and Ravinia. *Greger*, App. 156. As of the 1990 census, over two-thirds, or approximately 68 percent,[16] Ex. 614, p. 2, of those residing in the area of the former reservation were non-Indian.[17]

---

[16] The majority quotes the Bureau of the Census statistics but notes that the tribe "claims" that the census data are not accurate. App. 42. Apparently believing the controversy to be unimportant, the majority does not resolve the question. Reliance on the tribal "claims" would be, in any event, improvident. The basis of the tribal "claim" is apparently Exhibit 31, p. 1. The author of the exhibit stated that the demographic statistics were received by "calling the tribal office." T 81. The tribal chairman openly admitted that the number of residents at issue was arrived at simply by taking the total number of tribal members and dividing by two, T 314; he stated, "I assume it probably isn't" based on an actual count. T 314-315.

[17] The majority opinion's treatment of several other issues also directly conflicts with this Court's disestablishment jurisprudence. For example, although *Rosebud*, 430 U.S. at 602-603, indicates that a Presidential Proclamation which contained cession language was an "unambiguous" statement of "perceived disestablishment," the Yankton Proclamation, which likewise contains cession language is virtually ignored by the majority. Second, although the liquor provision of Article XVII of the Yankton Agreement is parallel to that found to



**D. The majority opinion conflicts with this Court's decision in *Perrin v. United States*.**

The decision of the divided court below conflicts with *Perrin v. United States*, 232 U.S. 478 (1914). *Perrin* involved the prosecution of a non-Indian for selling liquor on lands ceded by the 1894 agreement. This Court found, in effect, that the reservation had been disestablished by referring to the lands as "ceded lands *formerly* included in the Yankton Sioux Indian Reservation. . . . " *Id.* at 480 (emphasis added). The Court contrasted the "original reservation," of 400,000 acres with a 1914 acreage of about 100,000 acres. *Id.* at 486. This Court noted " '[i]f liquor is injurious to [the Indians] inside of a reservation, *it is equally so outside of it*. . . . ' " *Id.* at 484 (quoting *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 195 (1876) (emphasis added)).

The court below erroneously assumed that the issue of disestablishment was not actually before the Court in *Perrin*. App. 25, n.18. In fact, the United States argued that Petitioner "challenged the jurisdiction of the Court on these grounds: (1) the sale was on his property and *not on a reservation*." Brief of United States, *Perrin v. United States*, No. 707, p. 2 (January 1914) (emphasis added). Cases citing to *Perrin* have interpreted it as finding the Yankton Reservation has been diminished. *See, e.g., United States v. Mazurie*, 419 U.S. 544, 554 (1975) (*Perrin* involved lands which "originally had been included in the Yankton Sioux Indian Reservation, but had been ceded to the United States"); *Mescalero Apache Tribe v.*

---

indicate diminishment in *Rosebud*, 430 U.S. at 613, the majority slights its importance. *See* App. 56-57. Third, the majority fails to give proper deference to the importance of the school lands provision in the Act of Congress adopting the Yankton Agreement, *see* App. 57-58, although a similar provision in *Rosebud*, 430 U.S. at 599-601, strongly indicated diminishment.

*Jones*, 411 U.S. 145, 159 (1973) (Douglas, J., dissenting). ("In the liquor cases the Court held that it reached acts even off Indian reservations. . . . "). *See also Antoine v. Washington*, 420 U.S. 194, 203 (1975) (relying on *Perrin* in off-reservation regulation controversy); *United States v. Nice*, 241 U.S. 591, 597-598 (1916); *Johnson v. Gearlds*, 234 U.S. 422, 444-45 (1914).

## III

## THIS CASE RAISES ISSUES OF NATIONAL IMPORTANCE.

The question presented is of exceptional importance in two interrelated ways. First, the question is important because it directly affects the daily lives of all those who live in the area of the alleged reservation (and all those who live in the area of other alleged reservations). Prior to the decision of the federal courts below, criminal matters occurring on nontrust lands were regularly prosecuted in state, not federal, court. With the advent of the new regime imposed by the divided court of appeals, a tribal membership based analysis will be employed to determine which cases are parceled to federal, state, or tribal court. That law enforcement will be adversely affected is virtually preordained.

The effect on civil jurisdiction will be similarly dramatic. Prior to the recent decision of the divided court of appeals, the State exercised general civil jurisdiction over all persons within the 91 percent non-Indian area, and the tribe had never exercised such jurisdiction. Under the regime imposed by the divided court of appeals, a civil dispute between two tribal members would presumably be subject to only tribal court jurisdiction (whether the parties so desired or not) and a dispute involving an Indian and a non-Indian would generally be heard in tribal court (unless the Indian plaintiff desired to bring an action in state court). This Court now has before it the



issue of whether a dispute involving two non-Indians should be heard in state or tribal court. *Strate v. A-1 Contractors*, No. 95-1872 (Argued Jan. 7, 1997). The over 6,000 residents of the area can also expect constant unsettling litigation to determine which entity has jurisdiction over civil regulatory matters such as hunting and fishing, *see, e.g., South Dakota v. Bourland*, 508 U.S. 679 (1993); taxation, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992); zoning, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) and environmental regulation (such as prompted this litigation).

Second, the opinion of the court below puts into question whether reliance may be had on this Court's decisions in disestablishment questions. In particular, the decision below has the effect of undermining this Court's finding that "cession and sum certain" language creates an "almost irrebuttable presumption" of disestablishment. In addition, the decision below lightly dismissed this Court's findings with regard to the importance of "justifiable expectations" of those who themselves, and whose families, have lived in the area for very long periods, in this case as long as a century. As the State Supreme Court pointed out, this Court's 1914 *Perrin* decision itself "created considerable reliance." *Greger*, App. 157 n.13. The question presented is thus important to those who will face litigation in the future on these issues and to those who might be encouraged to undertake litigation because of the decision below. Grant of the Petition would send a strong message that this Court's precedents with regard to diminishment cases must be honored.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MARK W. BARNETT
Attorney General
*Counsel of Record*

JOHN PATRICK GUHIN
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
(605) 773-3215

## APPENDIX

APPENDICES

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

---

No. 95-2647

---

| | | |
|---|---|---|
| Yankton Sioux Tribe, a federally recognized tribe of Indians, and its individual members; Darrell E. Drapeau, individually, a member of the Yankton Sioux Tribe,<br><br>Plaintiffs - Appellees,<br><br>v.<br><br>Southern Missouri Waste Management District, a non-profit corporation,<br><br>Defendant - Third party plaintiff - Appellee,<br><br>v.<br><br>State of South Dakota,<br><br>Third party defendant - Appellant.<br><br>---<br><br>Charles Mix County, South Dakota; Flandreau Santee Sioux Tribe, Inc.; United States of America;<br><br>Amicus Curiae | * | Appeal from the United States District Court for the District of South Dakota |

Vine Deloria, Jr.; Philip S. Deloria; Philip Lane, Sr.; Philip Lane, Jr.; James Weddell, Descendants of Francois Deloria, Signatory to the Treaty of 1858, and descendants and relatives of Philip J. Deloria, Chief of Band Eight of the Yankton Sioux Tribe, at the time of the negotiation and ratification of the agreement of December 31, 1892.

Amici Curiae

---

Submitted: May 13, 1996

Filed: October 24, 1996

---

Before RICHARD S. ARNOLD, Chief Judge, MAGILL and MURPHY, Circuit Judges.

---

MURPHY, Circuit Judge.

This case raises questions about the extent to which an 1894 act of Congress affected the reservation of the Yankton Sioux Tribe in South Dakota. That statute ratified and incorporated an 1892 agreement between the tribe and the United States. The tribe brought this declaratory judgment action to enforce its claimed right to approve and regulate a landfill site over which the state claims



jurisdiction on the basis that the 1894 statute disestablished or diminished the Yankton reservation. After a trial the district court[1] ruled that the site was still part of the Yankton reservation so federal environmental laws applied, but that the tribe did not have regulatory authority over the project, which it declined to enjoin. The state appealed from the judgment, and we affirm.

I.

The Southern Missouri Waste Management District (Waste District) is a non-profit corporation which was established by several South Dakota counties to develop a regional solid waste landfill, for which it purchased land within the boundaries of Charles Mix County. The proposed site had been owned by a non-Indian but was within the Yankton Sioux Indian Reservation as defined by the 1858 treaty between the tribe and the United States.

The Waste District filed an application with the South Dakota Department of Environment and Natural Resources for a solid waste permit to construct the landfill on the site. The Yankton tribe was concerned about possible effects of the project, and it intervened and participated in the December 1993 administrative hearing on the permit application.

---

[1] The Honorable Lawrence L. Piersol, United States District Judge for the District of South Dakota.

After the state granted the permit, the tribe[2] sued the Waste District in federal court to stop construction until it could review and regulate the project. It sought a declaratory judgment that the boundaries established in the 1858 treaty still define the extent of the reservation. The Waste District joined the state as a third party defendant, and the state argued that the tribe had no jurisdictional authority over the 200,000 noncontiguous acres ceded to the United States in 1894.

The case was tried to the court over five days. The tribe's expert on Yankton Sioux history, Professor Herbert Hoover, testified that his research revealed no historical reason to believe the boundaries of the reservation had been changed by the 1894 act. Several witnesses testified for each side as to the potential impact of the landfill on tribal activities, the political organization and history of the tribe, and their perception of the reservation's boundaries. Much of the trial focused on technical issues relating to the construction and integrity of the landfill.

After considering post-trial briefing by the parties which focused on the legal significance of a savings clause in the 1892 agreement, the district court entered a declaratory judgment. It concluded that the 1894 act ratifying the 1892 agreement did not disestablish or diminish the

---

[2] The tribe sued on behalf of itself and its individual members, one of whom, tribal chairman Darrell E. Drapeau, also sued individually (collectively referred to as "the tribe").

The United States, the Flandreau Santee Tribe, and various descendants of two nineteenth century Yankton Sioux filed amicus briefs supporting the tribe on this appeal, and amicus Charles Mix County has supported the position of the state.



size of the reservation. *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 890 F. Supp. 878, 891 (D.S.D. 1995). The landfill site was therefore still part of the reservation, and regulations of the Environmental Protection Agency (EPA) applied, including the requirement that a synthetic liner be installed in each of the landfill cells to prevent leakage.[3] The court also concluded that the tribe had not shown a right to regulate the landfill site since it had not established either exception to the general rule that Indian tribes cannot regulate the activities of non-Indians, even on a reservation. *Montana v. United States*, 450 U.S. 544, 564-66 (1981); *see also*, *A-1 Contractors v. Strate*, 76 F.3d 930 (8th Cir. 1996) (en banc), *cert. granted*, 64 U.S.L.W. 3795 (U.S. Oct. 1, 1996) (No. 95-1872) (matters affecting tribal self-government and consensual relations with the tribe are excepted). The court also declined to enjoin the landfill project so long as it complied with the EPA liner requirement.

On appeal South Dakota argues that the district court erred as a matter of law in concluding that the 1858 tribal boundaries remain in effect despite the 1892 agreement, its ratification in 1894, and the subsequent sale of unallotted land. It contends that the language of the agreement, its ratifying statute, and surrounding circumstances show that Congress intended that the boundaries established

---

[3] South Dakota had approved the project plan to use only a two foot compacted clay liner to contain the garbage. Since the EPA had granted authority to the state to approve projects within its jurisdiction, synthetic liners would not have been required if the site were not on the Yankton reservation.

by the treaty of 1858 be disestablished or diminished.[4] The tribe responds that the intent and interest of Congress was in purchasing land for resale to non-Indian settlers, not in eliminating tribal authority in the area reserved in the treaty of 1858.[5]

II.

In the 1858 treaty between the Yankton Sioux and the United States the tribe surrendered over 11 million acres, and the United States in turn agreed "[t]o protect the said Yanctons [sic] in the quiet and peaceable possession" of a 430,000 acre reservation in southern South Dakota and a much smaller reservation in southwestern Minnesota.[6] 11 Stat. 743. The tribe also received $1.6 million to be paid in

---

[4] "Diminished" and "disestablished" seem to be used interchangeably in some cases. *See, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). "Disestablishment" appears to be more precisely used to describe the relatively rare elimination of a reservation, *see, e.g., DeCoteau v. District County Court*, 420 U.S. 425 (1975), as opposed to reduction in the size of a reservation or "diminishment." *See, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

South Dakota uses both terms in stating its position without really distinguishing between them, but its core argument is that the 1894 act eliminated the reservation, leaving the tribe and federal government with jurisdiction only over remaining trust lands.

[5] The tribe did not appeal the district court's denial of an injunction against the project or its conclusion that the tribe did not have regulatory authority over it.

[6] Evidence at trial disclosed that the Yankton Sioux had previously given up some 2 million acres in the 1830s and had historically been one of the most peaceful Indian tribes.



annuities over 50 years, as well as funds for a mill, schools, houses, and other expenses related to establishing the reservation.

The decades following the signing of the treaty brought significant changes in federal Indian policy as more settlers moved westward, increasing the demand for places to homestead. *Solem v. Bartlett*, 465 U.S. 463, 466 & n.6 (1984). Congress was also confronted with how to deal with tribes whose reservations had once been isolated but were located in areas in which states were then being formed.

In 1887 Congress passed the General Allotment Act (Dawes Act). 24 Stat. 388 (1887), codified at 18 U.S.C. § 331 *et seq.*. The Dawes Act permitted the federal government to allot plots of reservation land to individual Indians. Once the members of a tribe had received their individual allotments ("allotted lands") from the government, the surplus land ("unallotted lands") could be sold to non-Indian settlers. It was the government's policy until the early 1900s to sell reservation lands to settlers only after negotiating an agreement with the relevant tribe.[7]

The Dawes Act was intended both to advance the "civilization" and welfare of Indians and to provide land for settlement. *See DeCoteau*, 420 U.S. at 432. Although it did not mandate the elimination of reservations, it was

---

[7] In 1903 the Supreme Court ruled that Congress could unilaterally abrogate treaties with Indian tribes. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903); *see also Solem*, 465 U.S. at 470 n.11.

hoped that under the allotment policy Indians would benefit from individual ownership and responsibility, abandon their communal notions of property and social organization, and learn to farm from their non-Indian neighbors. *Hagen v. Utah*, 114 S. Ct. 958, 961 (1994). Individual members of the Yankton tribe eventually received allotments totalling about 230,000 acres scattered throughout the reservation. *Yankton Sioux Tribe v. United States*, 623 F.2d 159 (Ct. Cl. 1980).

By 1892 there was considerable pressure from settlers for more land in South Dakota, and a three member commission was appointed to negotiate with the Yankton Sioux about their unallotted lands. The commission was charged with reaching an agreement that would allow the United States to buy as much of the unallotted land as the tribe would sell. The record shows that some tribal members were interested in selling because of a severe drought and because of concerns for the elderly and infirm, the status of the Pipestone quarry in Minnesota, and compensation owed tribal members for their service in the United States Army. The government hoped that the new policy would help the Yankton Sioux assimilate. The Senate Committee on Indian Affairs reported that "close contact with the frugal, moral, and industrious people who will settle there will stimulate individual effort and make their progress much more rapid than heretofore." S. Rep. No. 196, 53d Cong., 2d Sess. 1 (1894).

The commission eventually succeeded in securing the signatures of a majority of the male members of the tribe



in favor of sale of the unallotted lands. Under the agreement, dated December 31, 1892,[8] the federal government would pay $600,000 with interest for some 200,000 acres within the boundaries of the reservation that had been established by the treaty of 1858.[9] The government intended then to sell plots of this land to settlers.

The agreement of 1892 contained several key provisions. In Article I the tribe agreed to "cede, sell, relinquish, and convey" all its right and title to transferred land, but Article XVIII stated that "Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858" and that all provisions of that treaty "shall be in full force and effect, the same as though this agreement had not been made. . . . " Consistent with the Dawes Act, the agreement also stated that lands allotted to tribal members were to be trust lands of the United States for twenty-five years, rather than grants to the Indians in fee simple. Articles IV, IX.

Congress incorporated the agreement into the ratifying statute in 1894 which passed without significant

---

[8] The required number of signatures was not obtained until several months after the date of the agreement.

[9] There is conflicting evidence in the record regarding the number of acres allotted to Indians and the number of unallotted acres sold to the United States. The Court of Claims later determined that roughly 230,000 acres were allotted to tribal members and some 200,000 unallotted acres were sold in 1894. *Yankton Sioux Tribe*, 623 F.2d at 174.

amendment.[10] 28 Stat. 286, 314. President Cleveland opened the unallotted lands for settlement by proclamation on May 16, 1895.

Congressional policy later changed when it became clear in the first decades of the twentieth century that the allotment policy was failing. *Solem*, 465 U.S. at 468 n.9; *Mattz v. Arnett*, 412 U.S. 481, 496 n.18 (1973). A significant number of Indians had not become self-sustaining farmers, and many allotments had been sold off when the allottees died. On the Yankton reservation for instance, only 100,000 of over 200,000 acres originally allotted remained in Indian hands by 1914. *United States v. Perrin*,

---

[10] The following are the relevant provisions Congress added to enact the agreement:

> Therefore, Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same hereby is, accepted, ratified, and confirmed.
>
> That for the purpose of carrying the provisions of this Act into effect there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of six hundred thousand dollars, or so much thereof as may be necessary. . . .
>
> That the lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota: Provided, That each settler on said lands shall . . . pay to the United States . . . three dollars and seventy-five cents per acre. . . .



232 U.S. 478 (1914). Critics concluded that the policy of integration by means of allotment had resulted in even greater poverty for Indian people. *See* Felix Cohen, *Handbook of Federal Indian Law* 215-17 (1988 ed.)

Congress responded with the Indian Reorganization Act of 1934, 48 Stat. 984 (1934), codified as amended at 25 U.S.C. § 461 *et seq.*, which once again placed primary emphasis on reservations in its Indian land policy. *Id.* Congress authorized the Secretary of the Interior to exchange lands held by Indians and non-Indians within each reservation in an attempt to consolidate tribal lands. *Id.* at § 463e. Nevertheless, the lands owned by Yankton Sioux tribal members remain scattered throughout the area of the 1858 reservation. Most of these lands are held in trust by the United States. Although the trust period was only to run twenty-five years, it was extended by executive order in 1920, Exec. Order April 16, 1920, and then apparently indefinitely by the Indian Reorganization Act in 1934. 48 Stat. 984, § 2.

## III.

Certain basic principles are part of the legal framework for the issues raised by the parties. Once a reservation is created by Congress through a ratified treaty or agreement, only Congress can reduce or eliminate it, and it must "clearly evince" its intent to do so. *Solem*, 465 U.S. at 470. Opening a reservation to settlement is not inconsistent with the preservation of existing boundaries, *Id.*, and some agreements and treaties preserved reservation boundaries, *see, e.g., Id.; Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962),

while others caused them to be diminished. *See, e.g., Hagen v. Utah*, 114 S. Ct. 958 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Ambiguity at any point is to be resolved in favor of the Indians, and diminishment should not be found lightly. *Hagen*, 114 S. Ct. at 965. Since federal policy towards Indians has changed over time, cases dealing with disestablishment and diminishment issues present difficult questions of statutory intent. *Solem*, 465 U.S. at 468; *see also, Hagen*, 114 S. Ct. at 973 (Blackmun, J., dissenting).

Each agreement with Indian tribes is different and must be evaluated in light of all the circumstances. *Hagen*, 114 S. Ct. at 965-66. The Supreme Court has devised a "fairly clean analytical structure" for diminishment cases; this requires consideration of the language of the statute and any agreement it incorporated, the historical context surrounding its passage, and how the land in question has been used since. *Id.* The parties disagree about the significance of some of the sections of the Yankton agreement and the historical evidence.

A.

The most important factor in determining whether Congress intended to disestablish or diminish the Yankton reservation is the 1894 statute, which incorporated the text of the 1892 agreement. *Id.* at 965. The state believes the language used to describe the conveyance in Articles I and II is particularly relevant, while the tribe focuses on the savings clause in Article XVIII. Each side



claims that other sections in the agreement also support its respective position.

South Dakota argues that the language in Articles I and II of the 1892 agreement makes it clear that Congress intended to disestablish or diminish the Yankton reservation. The full text of Article I is:

> The Yankton Tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation as set apart to said Indians [in the Treaty of 1858].

Article II provided that the tribe was to receive $600,000 for conveyance of the land.[11] The state argues that the Supreme Court has construed similar language as indicating congressional intent to diminish or disestablish reservations. *DeCoteau*, 420 U.S. at 445.

The tribe responds that the cession language in Article I alone is not controlling. It says that the savings clause in Article XVIII must be considered together with Articles I and II and that the negotiation and legislative

---

[11] Article II read:

> In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000) as hereinbefore provided for.

The act also provided for a twenty dollar gold piece for each male adult member of the tribe, payment of monies due some tribal members for services as Army scouts in the 1860s, and various other forms of support.

histories show that the first two articles were not intended to reduce the size of the reservation.

This court reviewed almost identical language to that in Article I in *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir. 1987), *vacated in part on other grounds on rehearing en banc*, 863 F.2d 572 (8th Cir. 1988), *cert. denied*, 493 U.S. 1047 (1990). In that case the Indians had agreed they would "for the consideration hereinafter named, . . . hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest" in their unallotted lands. *Id.* at 1290. The court concluded that the reservation had not been diminished because the agreement, "standing alone, does not evince a clear congressional intent to disestablish the Devils Lake Reservation." *Id.* In reaching this conclusion, the court followed the Supreme Court's practice of looking at a number of factors other than cession language to consider disestablishment issues, including surrounding circumstances such as whether there was a lump sum payment or express acknowledgement by the tribe that its reservation would be diminished. *Id.* at 1290 n.5.

The state argues that the $600,000 sale price in Article II, in conjunction with the "cede, sell, relinquish, and convey" language in Article I, gives rise to "an almost insurmountable presumption" that Congress intended to diminish the reservation. *Solem*, 465 U.S. at 470-71. The tribe asserts that the history behind Article II suggests that the payment provision in this statute did not indicate intent to diminish the reservation.

Article II passed in the Senate without modification, but the House of Representatives amended the agreement



to provide for payment to the tribe only as portions of the unallotted lands were sold to settlers. 53 Cong. Rec. 8268 (1894). Some believed it inappropriate for the government to make large cash payments when there was no guarantee that all land would be sold. *Id.* The House later withdrew its amendment apparently to avoid any charge of bad faith for changing the agreed terms. *See id.* at 8268-71. There was no discussion showing any understanding that a sum certain payment would express an intent that the reservation be diminished.

The commission negotiations indicated that both sides had been interested in seeing that unallotted lands were appraised and sold as individual plots to settlers. Tribal members believed they would receive a higher price if the lands were sold in this manner rather than as a whole to the government. *See, e.g.*, Negotiations at 77. The instructions to the commission from the Commissioner of Indian Affairs, dated July 27, 1892, stated in part: "It is understood that some of these lands are very valuable and will be eagerly sought after. It is therefore suggested the agreement provide for their appraisement and sale to the highest bidder." The Yankton commissioners apparently believed, however, that the tribe would receive more money from a single sale directly to the government so they adopted the approach taken in Article II. *See, e.g.*, S. Exec. Doc. No 27, 53d Cong., 2d Sess. at 68 (1894) ("Negotiations").

Although a lump sum payment can in some circumstances indicate congressional intent to diminish a reservation, *see, e.g., DeCoteau*, 420 U.S. at 447-448, the record in this case does not support that conclusion. The commission's instructions, the stated desires of the Indians,

and the House debate all show that a sum certain price was included for reasons other than issues of jurisdiction and sovereignty.

In their briefs the signatories to the 1892 agreement state that Article XVIII has the strongest savings clause of any unallotted land sale agreement between a tribe and the government. It states:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

A number of savings clauses in other agreements also state that earlier agreements and treaties will "be in full force and effect," but none include such a strong phrase as "the same as though this agreement had not been made," and most include language explaining that prior treaties will remain in force so long as they are "not inconsistent" with the later agreement. *See, e.g., Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 760-61 (1985) ("nothing in this agreement shall be construed to deprive [the tribe] of any benefits to which they are entitled under existing treaties not inconsistent with the provisions of this agreement."); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 623 (1977) (Marshall, J., dissenting) (benefits of existing treaties and agreements continue unless "inconsistent with the provisions of this



agreement."); *United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. 159, 162 (1971) (all treaty provisions "not altered by this agreement shall continue in force"); *Dick v. United States*, 208 U.S. 340, 352 (1908) (treaty provisions "not inconsistent with the provisions of this agreement are hereby continued in full force and effect").

Article XVIII contains no similar limitation. It does not state that only consistent aspects of the earlier treaty are to continue. It states simply that the provisions of the 1858 treaty are to remain in effect regardless of the contents of the agreement, "as though this agreement had never been made."

The rules of statutory construction require that all clauses of an agreement be read together in a way that will make them consistent and give all parts force. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Article XVIII should be read together with the other sections of the 1892 agreement to see whether all parts can be interpreted consistently, and the unusually expansive language of Article XVIII suggests that other sections should be read narrowly to minimize any conflict with the 1858 treaty.

The state does not dispute the strength of the language of Article XVIII, but argues that the savings clause in this case was meant only to reassure the tribe that it would continue to receive annuities under the 1858 treaty.[12] Interpreting Article XVIII to cover more than

---

[12] The state believes that clauses such as Article XVIII should not play any role in the statutory analysis because the *Rosebud* majority did not discuss them. There may be various

annuities would render the 1892 agreement largely meaningless, it says. The treaty of 1858 required the United States to "protect the said Yanctons [sic] in the quiet and peaceable possession of the said tract of four hundred thousand acres of land so reserved for their future home." If their possession were intended to continue "in full force and effect" after the 1892 agreement, sale of the unallotted lands would conflict with that intent by terminating the possessory rights of Indians. Article XVIII should therefore be read as covering only annuities.

The record shows that the tribe had been concerned about its annuities during the negotiations, but many concerns of a more general nature were also expressed. One of these concerns was the failure of the United States

---

reasons why they were not discussed, but the *Rosebud* clauses were significantly weaker than the Yankton savings clause. For example, one representative provision read:

> Each Act states, in almost identical terms, that "nothing in this 'agreement shall be construed to deprive the . . . Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement.' "

430 U.S. at 623 (Marshall, J., dissenting). Not only do the *Rosebud* provisions contain the "not inconsistent" language absent in Article XVIII, but they also focus on benefits rather than "all provisions" of a specific treaty.

Savings clauses were noted in other Supreme Court cases but not explicitly considered. *See Klamath*, 473 U.S. 753; *Chippewa Indians of Minnesota v. United States*, 301 U.S. 358 (1937); *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937).



to uphold its obligations under past treaties. *See, e.g.*, Negotiations at 55, 57-58.

Article XVIII is written in broad language, stating in the first sentence that nothing in the agreement "shall be construed to abrogate" the 1858 treaty and in the second sentence that "all provisions" of that treaty shall continue "in full force and effect." Only the second independent clause of the second sentence mentions annuities. The interpretation proposed by the state would give effect to only one of the independent clauses in one of the sentences. Other agreements specifically protected Indian annuities, but they did not use broad language apparently encompassing all treaty provisions.[13] These other examples show Congress knew how to limit the reach of an annuities provision, but it did not enact that type of limited provision in Article XVIII. Giving effect to the plain language and all parts of the article leads to the conclusion that it covers more than annuities.

It is possible to give meaning to all sections of the 1894 statute by examining them to see if they can be fairly reconciled, as the Supreme Court has directed. *Colautti*, 439 U.S. at 392. The key question in interpreting the 1894 statute and agreement is whether Congress intended that the tribe's governmental authority be transferred with the land sale. Amicus United States argues that the 1858 treaty gave the tribe governmental authority within the treaty boundaries and that Article XVIII requires that the

---

[13] *See, e.g., Shoshone Tribe v. United States*, 299 U.S. 476, 489 (1937) ("Nothing in this agreement shall be construed to deprive the Indians of any annuities or benefits to which they are entitled under existing agreements or treaty stipulations.")

agreement be read to preserve that right. Although the cession language in Articles I and II could be viewed as describing a transfer of tribal governmental authority as well as land, thereby changing the 1858 treaty boundaries, the narrower reading is that the 1894 act simply authorized the conveyance of real property. The Supreme Court has found the sale of lands to homesteaders not inconsistent with the preservation of existing reservation boundaries. *Rosebud*, 430 U.S. at 586. The Yankton treaty of 1858 acknowledged the authority of the tribe over the reservation, and Article XVIII of the 1894 statute indicated that as much of that treaty as possible was to be preserved. The narrower reading of Articles I and II gives consistent meaning to Article XVIII and the agreement as a whole.

This court has previously given effect to a savings clause in determining that the Fort Berthold reservation was not diminished. *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972). The savings clause in the agreement between the Three Affiliated Tribes and the United States read:

> That nothing in this Act shall be construed to deprive said Indians of Fort Berthold Indian Reservation of any benefits under existing treaties or agreements not inconsistent with the provisions of this Act.

*Id.* at 125. The court concluded that opening the reservation to settlement was not inconsistent with maintaining existing reservation boundaries. *Id.* (citing *Seymour v. Superintendent*, 368 U.S. 351 (1962)). Although the state



attacks the continued validity of *New Town*, it is consistent with subsequent Supreme Court precedent. *See Duncan Energy*, 27 F.3d 1296-97; *see also, United States v. Standish*, 3 F.3d 1207 (8th Cir. 1993). Article XVIII should be given due weight in interpreting the Yankton agreement just as in *New Town*.

Articles I, II, and XVIII may be read together to give meaning to them all, and we conclude that in combination they reveal an intent to preserve the 1858 reservation boundaries.[14] Moreover, to the extent there could be any ambiguity perceived in the statute, it would have to be resolved in favor of the tribe.[15] *Hagen*, 114 S. Ct. at 965.

---

[14] The Supreme Court has suggested that the jurisdictional pattern that results from a conclusion of diminishment or disestablishment may also be used to indicate what Congress had in mind. Where there is a "checkerboard pattern" of Indian trust land scattered over an area and a finding of disestablishment would terminate the entire reservation, it is less likely that Congress intended to change the boundaries. *Rosebud*, 430 U.S. at 598 n.20. Checkerboard jurisdictional arrangements are generally disfavored by both Congress and the courts. *See Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478 (1976); *Seymour*, 368 U.S. at 358; *United States v. Long Elk*, 565 F.2d 1032, 1039 (8th Cir. 1977).

A checkerboard pattern of jurisdiction would have been the result if the Yankton reservation had been diminished by the 1894 act. The Yankton Sioux retained the majority of the land within the 1858 boundaries (more than was retained by the Cheyenne River Sioux on their undiminished reservation). *Solem*, 465 U.S. at 464, 466 n.6. These facts distinguish this case from *DeCoteau* where Congress must have known it was creating an area composed mostly of non-Indian settlers. 420 U.S. at 435 n.16.

[15] The preamble to the 1892 agreement contains language that may be relevant to ascertain congressional intent. The

Several other articles in the agreement also have some relevance on the issue of congressional intent. For example, Article VIII reserves from sale to settlers "[s]uch part of the surplus lands hereby ceded and sold to the United States as may now be occupied by the United States for agency, schools, and other purposes . . . until they are no longer required for such purposes." An almost identical clause was considered by a unanimous Supreme Court in *Solem* to show that Congress foresaw continuation of the reservation there. 465 U.S. at 474 ("It is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation.").[16]

---

entire agreement, including the preamble, was incorporated into the ratifying statute in 1894. The preamble stated that the Yankton tribe was "willing to dispose of a portion of the land set apart and reserved to said tribe." The Supreme Court has concluded that the phrase "sell and dispose" indicates congressional intent to maintain existing reservation boundaries. *Solem*, 465 U.S. at 472-474; *see also Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1297 (8th Cir. 1994), *cert. denied*, 115 S.Ct.779 (1995). Where there is a potential conflict between sections of the statute, the preamble can be used to understand the intent of Congress. *Jurgensen v. Fairfax County*, 745 F.2d 868, 885 (4th Cir. 1984).

[16] Article VIII also appears to refute the argument that diminishment is indicated by the failure of the agreement to reserve land for the tribe's use. Evidence at trial indicated that the tribe had expected government of the reservation to continue through the Greenwood agency so no land needed to be reserved for that purpose. The reservation of agency land in Article VIII is consistent with an expectation on the part of the tribe that the reservation would continue as before. As in *Solem*, the United States has continued to hold lands in trust for the Yankton Sioux, and the day that federal services to the Yankton Sioux would be unnecessary has not yet come.



South Dakota suggests that Article XVII indicates that Congress intended to diminish the reservation. That article provided that no liquor should be sold or given away on either the lands ceded and sold to the United States or "upon any other lands within or comprising the reservations of the Yankton Sioux."[17] The district court found that this provision was included at the insistence of the Yankton Sioux, who were concerned that white saloons would attract tribal members "to the great injury of their people." 890 F. Supp. at 882. The state argues, however, that the inclusion of such a provision shows that the Indians knew that the unallotted lands would no longer be on reservation land after the sale. It cites *Rosebud* where the Supreme Court concluded that a similar clause in an agreement gave rise to an inference that Congress intended to diminish the Rosebud reservation in 1910. 430 U.S. at 613. A statute passed in July 1892 had outlawed the sale of intoxicants in Indian Country so it appeared the clause would not be needed in 1910 if the lands still were in Indian country. Act of July 23, 1892, 27 Stat. 260; *Rosebud*, 430 U.S. at 613.

---

[17] The full text of the article reads:

> No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, date April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

The negotiations with the Yankton tribe were conducted shortly after the 1892 liquor act had passed, and there is no evidence that any party was aware of it at the time the agreement was negotiated. The Yankton agreement provided that the prohibition on liquor would continue forever, while the agreement in *Rosebud* was only for twenty-five years. The 1892 liquor statute would have ceased to apply if the Yankton reservation were eliminated at some future point, but the liquor provision the tribe insisted on would remain. Article XVII in the Yankton agreement is therefore not surplusage in the same manner as the liquor provision in *Rosebud* and is not inconsistent with an intent to preserve the 1858 boundaries. The presence of a similar alcohol clause was found not to demonstrate an intent to diminish in *New Town*. 454 F.2d at 127.

The state argues that one other provision in the statute ratifying the 1892 agreement supports a finding that the reservation was diminished. Congress added the provision that "the sixteenth and thirty-sixth section in each Congressional township . . . shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota." Similar language in the *Rosebud* agreement was interpreted as having been intended to conform to the enabling act which admitted North and South Dakota to the United States. 25 Stat. 679 (1889). Under that act, the sixteenth and thirty-sixth sections in each township were granted to the state for common schools, but permanent federal reservations were excepted. *Id.*; *Rosebud*, 430 U.S. at 599-600. The Supreme Court reasoned that by using the same provision in the Rosebud



surplus land act as was used in the statehood act, Congress indicated its intent to diminish the Rosebud reservation. *Id.* at 600-01. South Dakota argues that the same reasoning should be applied here.

The rationale from *Rosebud* has considerably less force in this case, however, because the 1894 Yankton act makes the common school sections "subject to the laws of the State of South Dakota." If Congress had intended to diminish the Yankton reservation, those common school sections would have been subject to the laws of the state in any event and the grant of jurisdiction would have been unnecessary. The language is at least equally consistent with a reading that Congress wished to insure that the infrastructure would exist for common schools for all future residents of the assimilated area.

South Dakota argues that analysis of the statute and the agreement is unnecessary because certain federal and state cases should control the result here. Whether the Yankton reservation was diminished or disestablished has never been squarely litigated and decided in federal court, however.[18] The South Dakota cases were criminal

---

[18] The state claims that the Supreme Court established in *Perrin v. United States*, 232 U.S. 478 (1914), that the reservation was diminished by the 1894 act. In *Perrin* the Court concluded that Congress had authority to criminalize liquor sales on lands ceded by tribes and upheld a conviction for sales made within the 1858 Yankton treaty boundaries. The argument of the United States in *Perrin* focused on the plenary authority of Congress with regard to Indians and on the perpetual nature of the liquor ban; it did not claim that the town where Perrin sold liquor was still on reservation land. There was no discussion of diminishment.

In *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980), *cert. denied*, 451 U.S. 941 (1981), an Indian arrested in Wagner, South

prosecutions in which the tribe was not involved and do not show full development of the issues or the analytical approach required by the United States Supreme Court.[19] *See Solem*, 465 U.S. at 470. Moreover, the Supreme Court has indicated that federal courts are not necessarily bound by earlier state court conclusions about disestablishment issues.[20]

---

Dakota, which is within the 1858 boundaries, was convicted in state court and claimed he was entitled to habeas relief because his crime was committed in Indian Country. Diminishment was not litigated, and the court specifically noted that neither party raised the issue. *Id.* at 213 n.2.

In *Yankton Sioux Tribe v. United States*, 623 F.2d 159 (Ct. Cl. 1980), the Yankton tribe sought and received an award from the United States because, among other things, the $600,000 price fixed by the 1892 agreement was alleged to have been unconscionably low. The focus of the case was on the fair market value of the unallotted lands sold by the tribe, and comments the court made related to diminishment were dicta.

[19] The South Dakota Supreme Court has concluded that the Yankton reservation was diminished by the 1894 act, *see State v. Thompson*, 355 N.W.2d 349 (S.D. 1984); *State v. Williamson*, 211 N.W.2d 182 (S.D. 1973); *Wood v. Jameson*, 130 N.W.2d 95 (S.D. 1964), but it appears that the issues regarding diminishment were not fully presented to the court. The cases do not address the legislative history or the surrounding circumstances of the 1894 act or the savings clause in Article XVIII. They rely almost exclusively on the language of Articles I and II.

[20] The United States Supreme Court granted certiorari after an Eighth Circuit decision, *Bartlett v. Solem*, 691 F.2d 420 (1984), concluded that the Cheyenne River Reservation had not been diminished. *Bartlett* was in conflict with two South Dakota Supreme Court cases (*State v. Janis*, 317 N.W.2d 133 (S.D. 1982); *Stankey v. Waddell*, 256 N.W.2d 117 (S.D.1977)). The Court affirmed the Eighth Circuit decision in *Solem*. 465 U.S. at 466.



We conclude after examining the statutory language that Congress did not express in the 1894 act an intent to diminish or disestablish the reservation. Also relevant in the required analysis is review of the legislative history and the events near the time of its passage, *Hagen*, 114 S. Ct. at 965, and we turn now to this review.

B.

South Dakota contends that the legislative history indicates that the unallotted lands on the Yankton reservation were restored to the public domain and that this shows Congress intended to diminish the reservation. While "the existence of [public domain] language in the operative section of a surplus land Act indicates that the Act diminished the reservation," *Hagen*, 114 S. Ct. at 67, there is no mention of restoring the land to the "public domain" in the 1894 act or the 1892 agreement. South Dakota claims that even though there is no public domain language in the act itself, comments on the House floor about returning reservation lands to the public domain suggest an intent to diminish the Yankton reservation. The tribe responds that the debate was inconclusive at best.

Comments in Congress can be evidence of an intent to diminish, *see DeCoteau*, 420 U.S. at 446, but the legislative history does not demonstrate such an intent here. Several surplus land sales were included in a single Indian appropriations bill in 1894, including land purchases from the Yankton Sioux, Nez Perce, Yuma, Alsea-Siletz, Coeur d'Alene, and Yakima reservations. 26 Stat. 286 (1894). South Dakota points to two instances where

representatives mentioned the public domain. One stated that the various provisions in the agreements "change the methods of disposing of the lands that will become part of the public domain. . . . " 53 Cong. Rec. 6425 (1895). A second commented that the unallotted lands opened by the various agreements "are not governed by the public land laws until they become segregated from the Indian lands and become in fact a part of our public domain." *Id.* at 6426. Both comments were made in the context of a debate about whether the lands were to be furnished to settlers at no cost under the Homestead Act.

The comments cited by the state were made in reference to a group of agreements with some half dozen tribes. The different agreements were all included in one appropriations bill, but Congress used varying enacting sections for each.[21] For example, two of the six mentioned the public domain in the enacting section. Another explicitly referred to the fact that a new boundary would have to be drawn. Floor comments about multiple agreements which differ in their distinctive language and negotiation histories are of less value in evaluating congressional intent about any individual agreement than comments dedicated to that agreement alone.

The history of the commission to the Yankton Sioux and its negotiations with the tribe also suggests that

---

[21] At least one of the reservations under discussion has been found not to have been diminished. *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087, 1090-93 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986). The Tenth Circuit concluded that the "surrounding events concerning the 1894 and 1897 Acts are ambiguous." *Id.* at 1093.



Congress did not intend to disestablish the reservation. The commission was instructed: "If [the Yankton Sioux] are unwilling to cede all the surplus land you will endeavor to obtain the relinquishment of such part thereof as they may be willing to part with."[22] These instructions are consistent with the mission to secure land for settlement and to expose the tribe to settlers. Had the intent been the elimination of the reservation, it would have been necessary that all surplus lands be purchased.

The state points to a number of passages from the negotiations between the commission and the tribe which it believes show that the reservation would be disestablished, but the statements are consistent with a simple sale of the surplus lands and do not necessarily imply a transfer of sovereignty. For example, one of the commissioners said to tribal members:

> This reservation alone proclaims the old times and the old conditions. But even here the means of your former mode of life have vanquished [sic]. The tide of civilization is as resistless as the tide of the ocean, and you have no choice but to accept it and live according to its methods or be destroyed of it. To accept it requires the sale of these surplus lands and the opening of this reservation to white settlement.

Negotiations at 81. The commissioner talks of a "sale" of surplus lands and the "opening of this reservation," but

---

[22] The October 11, 1995 motion of South Dakota to enlarge the record with the instructions from the Commissioner of Indian Affairs to the Yankton commission is granted.

makes no mention of reduction or elimination of boundaries or any surrender of jurisdiction.

In another passage relied on by the state, a commissioner stated:

> The Great Father desires and seeks in this transaction the benefit of the tribe, and what you may receive in this matter will be for this tribe alone, to help elevate you to citizenship, and as soon as you become the equals and assistants of the white man in making the laws, to be near him and learn his ways, you will learn to farm, to do all kinds of business, to be citizens in the true sense of the word. It might be, after you have sold your lands, you could have this reservation organized as a separate county. If this could be done – I do not say it can – you could govern your own people in your own way, so long as you obeyed the laws of the State.

Negotiations at 48. This passage shows that possible future state jurisdiction over the Indians was contemplated, but it does not indicate when any such jurisdiction would attach and under what circumstances. The passage clearly appears to envision continuity of the reservation, with the possibility it could be transformed into a county at some later date.

The tribe argues that these comments are very weak when compared to statements made by, or to the Indians, in cases where diminishment was found. In *Rosebud*, for example, the tribe was specifically told that "[t]he cession of Gregory county . . . will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation." 430 U.S. at 593. In *Hagen*, the tribe was informed:



> You say that [the reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no boundary line to this reservation.

*Hagen*, 114 S. Ct. at 968 (internal citations omitted). In *DeCoteau*, a spokesman for the tribe stated:

> Now that South Dakota has come in as a state we have some one to go to, to right our wrongs. The Indians have taken their land in severalty. They are waiting for patents. The Indians are anxious to get patents. We are willing the surplus land should be sold. We don't expect to keep reservation." [sic]

*DeCoteau*, 420 U.S. at 433. The Indians on these three reservations were thus clearly aware that their reservations would be smaller after the sale of lands. Neither the commissioners nor the tribal members made like comments in this case.

The negotiations between the Yankton Indians and the commissioners sent to secure the sale of unallotted lands do not support a finding of diminishment. Despite a long series of negotiations, most of which were recorded and included in the commission's report to Congress, there is no statement that clearly indicates that Congress intended to change the reservation boundaries or remove tribal sovereignty over the opened areas. There are also no statements by members of the tribe that demonstrate an understanding that the reservation boundaries would change.

In addition to the history of the negotiations and the legislation, there is other evidence to examine which might indicate the contemporary understanding of the 1894 act. The tribe believes the most significant piece of contemporary evidence is in an 1896 statute passed by Congress. The statute began: "Be it enacted . . . [t]hat all settlers who made settlement under the homestead laws *upon lands in the Yankton Indian Reservation,* in the State of South Dakota, during the year eighteen hundred and ninety-five are hereby granted leave of absence from such homestead for one year. . . . " 29 Stat. 16 (Feb. 26, 1896) (emphasis added). Section 3 of the statute extends "the time for making final proof and payment for all lands located under the homestead laws of the United States upon any *lands of any former Indian reservation* in the State of South Dakota. . . . " *Id.* (emphasis added).

Congress thus continued in 1896 to refer to the unallotted lands as being in the Yankton reservation, a year after President Cleveland had opened the reservation lands for settlement. South Dakota argues that the 1896 statutory reference is entitled to little weight because the Commissioner of Indian Affairs used the word "former" in a document included in the legislative history. In the statute itself, however, Congress used "former" in section 3 when referring to a number of unspecified reservations in South Dakota, but not when referring to the Yankton reservation in section 1.

The state argues that other contemporaneous evidence indicates that the reservation was diminished. For example, it points to several statements by the Commissioner of Indian Affairs as being particularly relevant. Shortly after passage of the 1894 act, the commissioner



stated that the Yankton agreement in 1892 and two others would result in a significant amount of land being "restored to the public domain." Annual Report of the Commissioner of Indian Affairs 26 (1894). Two years later the commissioner referred to the "former" Yankton reservation. H.R.Rep. No. 100, 54th Cong., 1st Sess. at 2 (1896). These appear to be isolated references, however. The tribe's Yankton Sioux history expert testimony at trial was unrefuted that in the many thousands of documents he had read regarding the reservation, references to the former reservation or lands originally within the reservation were infrequent.

South Dakota also states that it began exercising jurisdiction over the areas no longer held in trust by the United States shortly after the lands were opened. An 1895 criminal case, *State v. Andrew War,* First Judicial Circuit Court, Charles Mix County, supports this claim, as do several other cases cited by the state. The exercise of jurisdiction by a state over opened lands can be an indication of congressional intent, but it is not dispositive. *See Solem,* 465 U.S. at 472.

Some other evidence is simply inconclusive. Both sides introduced a number of maps, many of them from within several years of the opening of the lands. These maps ultimately prove little except that there was some confusion both inside and outside the government as to the status of the reservation. The General Land Office of the Department of the Interior showed the reservation with only a dotted line on a 1901 map. The legend did not specify what a dotted line meant, but it is not the demarcation shown for a reservation. On the other hand the Bureau of Indian Affairs, also in the Interior Department,

continued to show the outline of the reservation on its maps. The type of outline used was identified in the legend to signify an Indian reservation, but the Yankton reservation was left unshaded while some other reservations were shaded. Study of the pattern of shading on these maps suggests that reservations opened to settlement were left unshaded. Because of these conflicting treatments and because an opened reservation is not necessarily diminished, these and similar maps are not particularly helpful.

Commercial maps have also differed. For example, *The Atlas of Charles Mix County, South Dakota*, published in 1906, does not appear to show the reservation. Exh. 631. A very detailed map of South Dakota in one 1895 atlas does show it. *Rand McNally World Atlas* 277 (1895). The confusion is perhaps best exemplified by *Andrees' Hand Atlas*, published in Germany. In both the 1899 and 1904 editions of the German atlas, a map of the United States shows the reservation (pages 160-61 in both editions), while a regional map on the next plate does not (pages 162-63).

These examples of confusion about the status of the lands are not enough to show that Congress expressly intended to diminish the reservation, and the 1896 statute is more probative of congressional intent than this more attenuated evidence. The statute is a statement by Congress itself and should guide the appraisal of the contemporaneous evidence. It suggests that Congress did not intend to diminish the Yankton reservation.



IV.

A.

The pattern throughout the twentieth century is similar to the contemporaneous evidence. Congress has continued to refer to the reservation as a continuing entity, but the treatment by other governmental bodies is mixed. Although less persuasive than evidence from the time surrounding an act's passage, later evidence is still relevant. *Hagen*, 114 S. Ct. at 965.

Congress has repeatedly referred to the Yankton Reservation as ongoing. In 1920, for example, Congress provided "[t]hat the Secretary of the Interior be . . . authorized and directed to convey to the trustees of the Yankton Agency Presbyterian Church, by patent in fee, the following-described premises situate [sic] *within the Yankton Indian Reservation*, county of Charles Mix, State of South Dakota." 41 Stat. 1468 (1920) (emphasis added). In 1932, Congress divided the United States District Court for the District of South Dakota into four divisions. "The territory embraced . . . in the counties of Aurora, Beadle, . . . Charles Mix, . . . Yankton, and *in the Yankton Indian Reservation*, shall constitute the southern division of said district." 47 Stat. 300 (1932) (emphasis added). More recently, a water project approved by Congress will "irrigate not more than approximately three thousand acres *of Indian-owned land in the Yankton-Sioux Indian Reservation*. . . . " Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575 § 2005(b) (1992) (emphasis added).

The state has not directed the court to a single enactment of Congress in which a reference was made to

indicate the reservation had been diminished. The statutory references demonstrate that Congress believes the Yankton reservation continues to exist.

The executive branch has been less consistent, but there is considerable evidence from it in support of an undiminished reservation. In its brief the tribe points to testimony before Congress by the superintendent of the Yankton Agency in 1914 that the reservation was "[a]bout 26 by 35 or 36 miles," the area encompassed by the 1858 boundaries. In 1916, President Woodrow Wilson ordered "that the trust period on the allotments of Indians on the Yankton Sioux Reservation, South Dakota, which expires during the calendar years 1916 and 1919, be, and is hereby, extended for a period of ten years from dates of expiration, with the exception of the following. . . . " (Exec. Order April 20, 1916).

Perhaps the foremost authority on federal Indian law, Felix Cohen wrote an opinion in 1941 while he was Acting Solicitor of the Department of the Interior that concluded the reservation was intact. It read in part:

> The circumstances which influenced the Indian Office decision [that the reservation had been diminished] are the large amount of reservation land which has been fee patented and the existence of towns within the reservation. These circumstances may be persuasive in reaching an administrative conclusion, but I cannot agree with the conclusion as a matter of law.
>
> The agreement of 1892 provided for the sale of such lands within the reservation as were not allotted or used for designated purposes. It did not provide for the sale of a particular designated part of the reservation. The act should be distinguished from other cession acts which ceded a definite part of the reservation and treated the remaining area as a diminished reservation. The lands allotted on the Yankton Reservation were scattered over all the reservation. . . . Since the 1892 agreement there has been no redefinition by Congress of the Yankton Reservation nor determination that the reservation no longer exists. On the contrary, the reservation was referred to as a still existing unit in the acts of April 29, 1920 (41 Stat. 1468) and June 11, 1932 (47 Stat. 300).



Letter of August 7, 1941, *Opinions of the Solicitor, Department of the Interior* 1063 (1979).

Others within the executive branch have taken varying positions. In 1969 an Associate Solicitor wrote that "the effect of the 1894 Act was to eliminate reservation boundaries and terminate the tribe's authority to establish a tribal court." Memorandum M-36783 from Associate Solicitor, Indian Affairs, to Commissioner of Indian Affairs, 1 (September 10, 1969).[23] An employee of the Bureau of Indian Affairs in its Aberdeen, South Dakota office testified at trial that his office considers the 1858 boundaries to be intact, and the 1990 census includes figures for the "Yankton Reservation" as defined by the 1858 boundaries. *See, e.g.*, Bureau of the Census, U.S. Dep't of Commerce, Pub. No. 1990 CPH-1-43, Summary

---

[23] The parties introduced scores of documents to show how the reservation has been treated. Only representative samples are discussed here; others were addressed in the district court's opinion.

Population and Housing Characteristics – South Dakota 175 (1991). The United States as amicus in this case (and also a party to the treaty of 1858 and the 1892 agreement) argues that "the 1892 Agreement, as ratified by Congress, did not diminish or disestablish the exterior boundaries of the Yankton Sioux Reservation."

The state government has quite consistently exercised various forms of governmental authority over the opened lands on the Yankton reservation. State courts have exercised criminal jurisdiction over Indians on nontrust lands without objection from the tribe until recently. *See, e.g., supra* note 19. The state has also exercised some civil jurisdiction, at least over divorces between tribal members. *See, e.g., Redbird v. Redbird*, First Judicial Circuit Court, Charles Mix County (1916). The state has also played a significant regulatory role in mining, underground storage tanks, agriculture, air emissions, solid and hazardous waste, and other environmental activities in the area. The county and municipalities employ law enforcement personnel and maintain over 500 miles of roads within the 1858 boundaries, while the Bureau of Indian Affairs maintains only 20 miles of roads.

The state's treatment of the reservation has not been uniform, however. Ronald Catlin, a state witness and an employee of the South Dakota Department of Game, Fish, and Parks recalled seeing a memorandum instructing state employees how to refer to the reservation. Catlin remembered that the memo was written by Governor William Janklow sometime between 1978 and 1986 and directed employees to refer only to the "former Yankton Sioux Reservation." A reasonable inference to be drawn is



that at least some state employees had been referring to the reservation as if it still existed.

The state argues that the tribe itself has not asserted jurisdiction over the opened areas and that some documents indicate that tribal members believed that the reservation boundaries had been reduced. The tribe's 1932 constitution was silent on the issue of jurisdiction, but the amended 1962 constitution claimed jurisdiction over "all original Tribal lands now owned by the Tribe under the Treaty of 1858." The tribe presented no evidence that it has attempted until recently to exercise civil, regulatory, or criminal jurisdiction over nontrust lands. Undisputed evidence at trial indicated that the tribe's effectiveness at self-government has also varied considerably over time.

Modern maps and atlases seem to show the reservation as extending to the 1858 boundaries. *See* U.S. Department of Commerce, *1990 Census of Population: Social and Economic Characteristics, South Dakota* G-6 (1993); U.S. Department of the Interior Bureau of Indian Affairs, *Indian Land Areas (General)* [map] (1987); *National Geographic Historical Atlas of the United States*, 47 (Centennial Edition 1988) (*see also*, loose map entitled "Northern Plains" included with the atlas); Waldman & Braun, *Atlas of the North American Indian* 196-97 (Facts on File Publications 1985).

Considering all of the evidence submitted by the parties and amici regarding the subsequent history of the reservation, we cannot say that the surrounding circumstances are "fully consistent with an intent to terminate the reservation, and inconsistent with any other purpose." *See DeCoteau*, 420 U.S. at 448.

B.

South Dakota argues that "[t]he Supreme Court has decreed that even in a case where de jure diminishment may not have occurred, 'de facto' diminishment may nonetheless have occurred." The tribe and the United States respond that de facto diminishment has never been applied in the absence of congressional intent to diminish.

*Solem* contains the Supreme Court's most complete discussion of de facto diminishment. It recognized there that:

> who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment may have occurred.

*Solem*, 465 U.S. at 471. South Dakota argues that this permits a finding of diminishment even in the absence of congressional intent.

The Court in *Solem* cautioned, however, that subsequent demographic data are only "one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." *Id.* at 471-72.

> When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.



*Id.* at 472. Subsequent demographic data and jurisdictional history regarding the opened lands may therefore be useful evidence of congressional intent, but cannot substitute for it.

The demographic facts related to the Yankton reservation are somewhat incomplete. Between 1890 and 1900, the population of Charles Mix County doubled, but it is not clear from the census data how many of those people settled on the open lands within the 1858 boundaries.[24] Of the 8,498 persons in the county in 1900, 1,483 were Indians. Assuming that people were distributed evenly throughout the county (which is not clear from the record), roughly 4,000 people would have lived within the 1858 boundaries. The Indian population would have made up about 40 percent of the reservation.

Demographic shifts that happen soon after an act is passed would appear to be stronger evidence of congressional intent than later population changes because those closer in time might have been better anticipated by Congress. The contemporaneous evidence suggests that the area did not lose its "Indian character," *see Solem*, 465

---

[24] There is an additional source of uncertainty in these data. South Dakota points out that the Census Bureau did not provide a separate category for the Yankton reservation in the 1900 census. It is therefore possible that almost half of the increase in population during this decade can be attributed to adding the Yankton Sioux population in with the non-Indians.

U.S. at 471, because more than 53 percent of the land was allotted to tribal members who composed at least 40 percent of the population. After 1900 the Indian population apparently declined somewhat. *Southern Missouri*, 890 F. Supp. at 887.

There is some dispute in the record about precisely how many Yankton Sioux now live within the 1858 boundaries. According to the 1990 census, there were 1,994 American Indians and 4,275 non-Indians living on the "Yankton Reservation," which the Census Bureau defined as being within the 1858 boundaries.[25] Bureau of the Census, U.S. Dep't of Commerce, Pub. No. 1990 CP-1-43, General Population Characteristics – South Dakota 29 (1992). The tribe claims that the census data do not accurately reflect the population of the area and that some 3,400 enrolled members of the tribe resided on the reservation as of 1993. These two sets of figures indicate that between 32 and 44 percent of the people within the 1858 boundaries are Indians.[26] (In contrast, the 1990

---

[25] South Dakota points out that the United States holds in trust for Indians some 37,000 acres within the 1858 boundaries. This is less than ten percent of the total number of acres. Property ownership appears to be an unreliable indicator of the character of the area, however, because census data from 1990 reveal that almost two-thirds of the Indian households on the reservation rent their homes.

[26] Even if the lower 32 percent figure is used for the Indian population in the old treaty area, it is much higher than that of the Lake Traverse Indian Reservation which the Supreme Court found had been disestablished in *DeCoteau*. On that reservation, only 3,000 of 33,000, or nine percent, of the people within the original treaty boundaries were Indians. *DeCoteau*, 420 U.S. at 428.



census reports that of the Indians living in Charles Mix County, only eight live outside the 1858 treaty boundaries.)

Finally, the evidence shows that the Indian population and influence in the area is increasing quite rapidly, a trend which appears likely to continue. The tribe opened the Fort Randall casino in 1991 which has provided both jobs and financial resources to tribal members and is apparently now the largest employer in Charles Mix County. The tribe has also announced its intention to use some of the casino proceeds to reacquire title to lands which have passed from Indian hands since 1894. Meanwhile the non-Indian population is decreasing.

The historical and demographic evidence does not show that Congress intended to change the 1858 boundaries. Only Congress can reduce or eliminate a reservation, *see, e.g., Solem*, 465 U.S. at 470, and it is "totally inappropriate" to rely only on de facto diminishment to reduce the size of a reservation. *Duncan Energy*, 27 F.3d 1294, 1298 (8th Cir. 1994). The Yankton Sioux make up a significant portion of the population of the treaty area, and their numbers and economic influence are increasing. Thus, even if de facto diminishment were possible in spite of the lack of substantial evidence of congressional intent in the 1894 act and its legislative history, *see Solem*, 465 U.S. at 472, the record would not support it here.

V.

In sum, application of the factors deemed relevant by the Supreme Court leads to the conclusion that Congress intended by its 1894 act that the Yankton Sioux sell their

surplus land to the government, but not their governmental authority over it. Close examination of the agreement, the act, and the historical record does not reveal the "[s]ubstantial and compelling evidence of a congressional intention to diminish Indian lands" necessary for disestablishment or diminishment, but instead indicates the 1858 treaty boundaries were to be preserved. *Solem*, 465 U.S. at 472. The judgment of the district court is affirmed.

MAGILL, Circuit Judge, dissenting.

I believe that the district court erred in holding that the Yankton Sioux Reservation had not been diminished. *See Yankton Sioux Tribe v. Waste Management Dist.*, 890 F. Supp. 878, 879 (D.S.D. 1995). The August 15, 1894 Act opening the Yankton Sioux Reservation to white settlement, an Act fulfilling treaty stipulations with and support of indian tribes, Ch. 290, 28 Stat. 314 (1894) (1894 Act), which ratified the 1892 agreement between the United States and the Yankton Sioux Tribe (1892 Agreement), contained language of cession of land for a sum certain, which created "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Solem v. Bartlett*, 465 U.S. 463, 470-71 (1984) (citing *DeCoteau v. District County Court*, 420 U.S. 425, 447-48 (1975)).[27] Because this presumption has not been rebutted in this case, I must respectfully dissent.

---

[27] The boundaries of the Yankton Sioux Reservation were established by a treaty between the United States and the Yankton Sioux Tribe in 1858. *See* Act of April 19, 1858, 11 Stat. 743 (1858) (Treaty of 1858).



I.

Although "the Congresses that passed the surplus land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process," *Solem*, 465 U.S. at 468, we may not "extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act." *Id.* at 468. Instead, "some surplus land Acts diminished reservations," *id.* at 469, while "other surplus land Acts did not." *Id.* The United States Supreme Court, which has frequently addressed this issue,[28] has provided the proper analysis for determining if diminishment has occurred:

> Our analysis of surplus land Acts requires that Congress clearly evince an intent to change boundaries before diminishment will be found. The most probative evidence of congressional intent is the statutory language used to open the Indian lands. *Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands. When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its*

---

[28] In addition to *Solem* and *DeCoteau*, the Supreme Court has considered the issue of diminishment in *Hagen v. Utah*, 114 S. Ct. 958 (1994), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *Mattz v. Arnett*, 412 U.S. 481 (1973), and *Seymour v. Superintendent*, 368 U.S. 351 (1962). In *Hagen*, *Rosebud*, and *DeCoteau*, the Court found diminishment based on an allotment-era statute.

> *opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished.*

*Solem*, 465 U.S. at 470-71 (citations and quotations omitted, emphasis added). In addition to creating this "almost insurmountable presumption" of diminishment, *id.* at 470, specific language of cession coupled with payment for a sum certain is an "extreme" example of Congress's express intent to diminish a reservation, *see id.* at 469 n.10, which is "precisely suited to disestablishment" purposes. *Id.* at 473 n.15 (quotations omitted). *See also DeCoteau*, 420 U.S. at 445 (express language of cession combined with payment of a sum certain "was precisely suited to this purpose" of terminating reservation).

The 1894 Act contained the following provisions:

> Article I.
>
> The Yankton tribe of Dakota or Sioux Indians hereby *cede, sell, relinquish, and convey* to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.
>
> Article II.
>
> In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians *the sum of six hundred thousand dollars ($600,000)*, as hereinbefore provided for.

Ch. 290, 28 Stat. at 314-15 (emphasis added).



Because Articles I and II of the 1894 Act contain language of cession of land for a sum certain, they create an almost insurmountable presumption of diminishment. The task of this Court is therefore to determine if the proponents of a continued reservation status for the ceded lands have successfully rebutted this presumption of diminishment.[29] The majority, however, never makes this critical analysis. Indeed, the majority never acknowledges that the presumption of diminishment exists,[30] nor

---

[29] Although the United States Supreme Court has never found that this presumption of diminishment has been rebutted, its choice of the phrase, "*almost* insurmountable presumption," *Solem*, 465 U.S. at 470 (emphasis added), suggests it is at least theoretically possible, although difficult, to rebut this presumption of diminishment. The Court has not, however, enunciated what quanta of evidence is necessary to achieve this feat. Because an "almost insurmountable presumption" is obviously not to be lightly discarded, it would seem that one challenging it should have the burden of presenting evidence which, at a minimum, clearly and convincingly demonstrates that Congress intended to maintain tribal governance over ceded lands despite its enactment of provisions precisely suited to diminishment.

[30] While the majority makes two passing references to this critical presumption, it couches each reference as a mere restatement of the appellant's argument. *See* Maj. Op. at 11 ("The state argues that the Supreme Court has construed similar language [as that in Articles I and II] as indicating congressional intent to diminish or disestablish reservations. *DeCoteau*, 420 U.S. at 445."); *id.* at 12 ("The state argues that the $600,000 sale price in Article II, in conjunction with the 'cede, sell, relinquish, and convey' language in Article I, gives rise to 'an almost insurmountable presumption' that Congress intended to diminish the reservation. *Solem*, 465 U.S. at 470-71."). Nowhere in its opinion does the majority acknowledge that the appellant is correct that this almost insurmountable presumption of diminishment was created by Articles I and II.

does it hold that the presumption of diminishment has somehow been rebutted.

Rather than addressing the presumption created by Articles I and II together, the majority considers each Article separately. Citing to *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir. 1987), *vacated in part on other grounds on reh'g en banc*, 863 F.2d 572 (8th Cir. 1988), *cert. denied*, 493 U.S. 1047 (1990), which construed an allotment-era statute which contained a provision similar to Article I, the majority states that Article I's cession language "alone is not controlling." Maj. Op. at 11. Unlike the instant case, however, *Grey Bear* did not involve an allotment-era statute which provided for a sum certain payment for ceded land. *See Grey Bear*, 828 F.2d at 1290. This lack of a sum certain payment was critical to this Court's analysis in *Grey Bear*, where we stated:

> The Supreme Court has held that such explicit reference to cession suggests that Congress intended to divest the reservation of its land. *See Solem*, 465 U.S. at 470. The Court has further held that "[w]hen such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Id.* at 470-71. We agree with the district court's analysis that although the "cede, surrender, grant, and convey" language of the Act suggests congressional intent to disestablish the reservation boundaries, *see Rosebud*, 430 U.S. at 597; *DeCoteau*, 420 U.S. at 445, the Act does not contain an *unconditional* commitment by Congress to pay the tribe for the ceded lands. [*United States v. Grey Bear*, 636 F. Supp. 1551, 1554 (D.N.D. 1986)]. Compensation for the lands was not set at any fixed price and the tribe was guaranteed reimbursement only for the lands actually disposed of by the government. Thus, the "almost insurmountable presumption" of disestablishment urged by defendants is not present in this case.



*Id.* at 1290 (emphasis in original). The 1894 Act *does* contain the critical language of an "*unconditional* commitment by Congress to pay the tribe for the ceded lands," *id.* (emphasis in original), and consequently places the instant case on an entirely different footing than *Grey Bear*. Rather than supporting the majority's decision to ignore the presumption of diminishment created by Articles I and II, therefore, *Grey Bear* strongly supports adhering to United States Supreme Court precedent.

The majority similarly discards the importance of Article II by asserting that "[a]lthough a lump sum payment can in some circumstances indicate a congressional intent to diminish a reservation, *see, e.g., DeCoteau*, 420 U.S. at 447-48, the record in this case does not support that conclusion." Maj. Op. at 13. The majority fails to recognize that the language actually chosen by Congress is the best indication of its intent. *See Citicasters v. McCaskill*, 89 F.3d 1350, 1354-55 (8th Cir. 1996) (citing cases). Rather than turning to the legislative history only to clarify an ambiguous statute, the majority seems to suggest that the plain meaning of a statute must be rejected unless positively supported by its legislative history. This approach is simply not correct. In Article II, Congress chose language "precisely suited" to diminishment, *DeCoteau*, 420 U.S. at 445, and the majority has pointed to nothing in the legislative history that betrays a contrary intent. *See* Maj. Op. at 12-13 (discussing legislative history).

Without acknowledging the almost insurmountable presumption of diminishment created by the interplay of Articles I and II, the majority relies on the savings clause in Article XVIII to support its conclusion that the reservation was not diminished by the 1894 Act.[31] Article XVIII

---

[31] The majority indicates that "[i]n their briefs the signatories to the 1892 agreement state that Article XVIII has the strongest savings clause of any unallotted land sale agreement between a tribe and the government." Maj. Op. at 13. Assuming that this refers to the appellee and to amicus the United States, I am at a loss as to why the majority finds the assertions of these parties so significant; surely, the "strength" of a savings clause is a question of law for this Court to determine, and is independent of the parties' historical relationship to the legislation. To the extent that Article XVIII represents an unusual savings clause, however, I note that the United States Supreme Court found diminishment despite similarly "strong" – if less verbose – savings clauses in two other allotment-era statutes. In *Montana v. United States*, 450 U.S. 544, 548 (1981), the Court concluded that 22 Stat. 44 reduced a reservation to 2.3 million acres, despite a savings clause that provided that "all the existing provisions of May seventh, eighteen hundred and sixty-eight, [establishing an 8,000,000 acre reservation] shall continue in force." An Act accepting and ratifying agreement for sale of a portion of the Crow Indians of Montana reservation, Ch. 74, 22 Stat. 42 (1882). Similarly, in *DeCoteau*, 420 U.S. at 446, the United States Supreme Court found diminishment despite a savings clause in an allotment-era statute which provided that an earlier treaty's provisions, which established a reservation's boundaries, "shall continue in force." An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, Ch. 543, 26 Stat. 989, 1042 (1891). Thus, while I agree that savings clauses may have a role in our statutory interpretation, *see, e.g., City of New Town v. United States*, 454 F.2d 121, 125 (8th Cir. 1972), they should not have the talismanic significance proffered by the majority.



provides:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, *and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.*

Ch. 290, 28 Stat. at 318 (emphasis added). Disregarding that the cession of land for a sum certain provided by Articles I and II constitute an "extreme" example of Congress's express intent to diminish a reservation, *see Solem*, 465 U.S. at 469 n.10, which is "precisely suited to disestablishment" purposes, *id.* at 473 n.15 (quotations omitted), the majority states that "Articles I, II, and XVIII may be read together to give meaning to them all, and we conclude that in combination they reveal an intent to preserve the 1858 reservation boundaries." Maj. Op. at 17 (note omitted). I disagree.

Based on the language of Article XVIII, legislative history, and the purpose of the 1894 Act, the only reasonable interpretation of Article XVIII is that it extended to annuities, and no farther. No one, including the district court, any party or amici, or the majority, suggests that we interpret Article XVIII literally, because to do so would eviscerate the 1894 Act, nullifying its chief provisions and contradicting its entire purpose.[32] Under the

---

[32] The Treaty of 1858, between the United States and the Yankton Sioux Tribe, provided that:

Act of April 19, 1858, 11 Stat. 743 (1858) (Treaty of 1858), the Yanktons were not to be dispossessed of their lands,

---

Article 1.

The said chiefs and delegates of [the Yankton Sioux] tribe of Indians do hereby cede and relinquish to the United States all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof, situated and described as follows, to wit – [describes boundaries of reservation].

. . . .

Article 4.

In consideration of the foregoing cession, relinquishment, and agreements, the United States do hereby agree and stipulate as follows, to wit:

1st. *To protect the said Yanctons [sp] in the quiet and peaceable possession of the said tract of four hundred thousand acres of land so reserved for their future home, and also their persons and property thereon during good behavior on their part.*

2d. To pay to them, or expend for their benefit, the sum of sixty-five thousand dollars per annum, for ten years, commencing with the year in which they shall remove to, and settle and reside upon, their said reservation – forty thousand dollars per annum for and during ten years thereafter – twenty-five thousand dollars per annum for and during ten years thereafter – and fifteen thousand dollars per annum for and during twenty years thereafter – and fifteen thousand dollars per annum for and during twenty years thereafter; *making one million and six hundred thousand dollars in annuities in the period of fifty years* . . . .

Article 10.

*No white person, unless in the employment of the United States, or duly licensed to trade with the Yanctons, [sp] or members of the families of such persons, shall be permitted*



and white settlers were not allowed within the 1858 boundaries of the reservation. The undisputed purpose of the 1894 Act, however, was to obtain Yankton land for white settlement; the 1894 Act specifically dispossessed the Yanktons of a substantial portion of their reservation and allowed white settlers to purchase them. The 1858 Treaty's provisions cannot be reconciled with the 1894 Act, and Article XVIII of the 1894 Act therefore cannot mean what it says. *See Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966) (" 'There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. *When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act.*' " (emphasis added) (quoting *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940))); *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938) ("to construe statutes so as to avoid results glaringly absurd, has long been a judicial function"). *See also United States v. Granderson*, 114 S. Ct. 1259, 1268-69 (1994) (using "a sensible construction" to interpret a Sentencing Guideline "that avoids attributing to the legislature either an unjust or an absurd conclusion" (citations and quotations omitted)); *Colautti v. Franklin*, 439 U.S.

---

*to reside or make any settlement upon any part of the tract herein reserved for said Indians*, nor shall said Indians alienate, sell, or in any manner dispose of any portion thereof, except to the United States. . . .

(emphasis added).

379, 392 (1979) (describing "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

Although a literal interpretation of Article XVIII is not possible without absurd results, it is still this Court's task to determine the intent of the 53rd Congress in crafting this provision of the 1894 Act. Determining the legislative intent of a bygone Congress is not a license to redraft poorly constructed legislation to achieve a result more in harmony with modern sensibilities, however, and the majority should have forsaken this opportunity to do so. Contrary to the majority's inventive interpretation of the savings clause, nowhere in Article XVIII nor in the legislative history of the 1894 Act is there any suggestion that the 1858 boundaries were to remain intact, nor that the tribe was to have continuing authority over ceded lands.[33] Rather, Article XVIII specifically reassured tribal

---

[33] The majority asserts that "to the extent there could be any ambiguity perceived in the [1894 Act], it would have to be resolved in favor of the tribe." Maj. Op. at 17-18. In *DeCoteau*, the United States Supreme Court commented on the temptation to misuse this canon of construction that ambiguities are to be resolved in favor of the tribe:

> For the courts to reinstate the *entire* reservation, on the theory that retention of mere allotments was ill-advised, would carry us well beyond the rule by which legal ambiguities are resolved to the benefit of the Indians. We give this rule the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. *A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.*



members that annuities would continue, and the issue of annuities was of foremost importance in the negotiations for the cession of land. *See, e.g.*, S. Exec. Doc. 27, 53rd Cong., 2d Sess. at 17-19 (Mar. 31, 1893 Report of the Yankton Indian Commission). Indeed, even historian Herbert Theodore Hoover, the Yankton tribe's expert witness, testified that, at the time of the negotiations preceding the 1894 Act, there existed

> a rumor that [the Yanktons] believed that if they didn't sell the surplus land, the government of the United States was going to cut off their annuities. . . . So there was a belief in the tribe that it's plausible the government might shut these [annuities] down if we resist [selling land], because the resistance had led to the loss of annuities in the past. And one should not have the opinion that tribal members didn't communicate with each other, because Yanktons ran a lot with government support to hunt west of the Missouri River. So it's my opinion that the Yanktons would have believed that the government might cut off the annuities, and that would have been disastrous. . . . I believe that they believed that they were threatened by the loss of the annuities.

Trial Tr. at 53-55.

The majority's assertion that "Article XVIII of the 1894 statute indicated that as much of [the 1858] treaty as possible was to be preserved," Maj. Op. at 17, is based neither on the text – which referred only to annuities –

---

420 U.S. at 447 (emphasis added). The majority, therefore, may not use a canon of construction to create ambiguity where there is none, and there is no ambiguity in Articles I and II.

nor the legislative history of the 1894 Act, and has as its source only, as best as I can discern, a single-minded desire to avoid diminishment at all costs. Because Article XVIII extended only to annuities, it could not rebut the powerful presumption that the Yankton Sioux Reservation was diminished.

II.

Other provisions of the 1894 Act are also relevant to a diminishment analysis. First, Article XVII of the 1894 Act prohibited the sale of liquor on the ceded lands. The inclusion of a liquor prohibition provision in an allotment statute is indicative of an intent to diminish the reservation, because standing law had already prohibited the introduction of alcohol into Indian country. *See Rosebud*, 430 U.S. at 613, 613-15 n.47. *But see Solem*, 465 U.S. at 475-76 n.18 (describing this provision as being "obviously of secondary importance to our decision" in the *Rosebud* case).[34] Second, Article VIII of the 1894 Act, which reserved parcels of ceded land for agency and school use, is similar to a provision the *Solem* Court found indicative of a continued reservation status. *See* 465 U.S. at 474. The *Solem* Court, however, did not consider what impact, if

[34] Apparently assuming that neither tribal members nor government negotiators kept abreast of significant legislation affecting Indian country, the majority dismisses Article XVII by asserting that "there is no evidence that any party was aware of [the 1892 liquor act] at the time the agreement was negotiated." Maj. Op. at 20. I am sure that, if Congress had been aware that the plain language of its legislation was insufficient to convey its meaning to future courts, the legislative history in this case would have been much more complete.



any, such a provision could have on the almost insurmountable presumption of diminishment created by Articles I and II.

Finally, the 1894 Act reserved the sixteenth and thirty-sixth sections in each "Congressional township" of the ceded lands for common schools, which were to "be subject to the laws of the State of South Dakota." Ch. 290, 28 Stat. at 319. A virtually identical provision in the statute opening the Rosebud Sioux Reservation was found by the Supreme Court to be strongly indicative of diminishment. *See Rosebud*, 430 U.S. at 599-601. The Court reasoned that the grant of land for common schools was based on § 10 of the Act of February 22, 1889, 25 Stat. 679 (admitting Act), which admitted North and South Dakota into the Union. The admitting Act provided that:

> [U]pon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States . . . are hereby granted to said States for the support of common schools . . . : *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants . . . of this act, *nor shall any land embraced in Indian, military, or other reservations of any character be subject to the grants . . . of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.*

*Reprinted in Rosebud*, 430 U.S. at 599-600 (emphasis added). The *Rosebud* Court reasoned that, because the admitting Act specifically excluded a grant of land in an Indian reservation until after the reservation had been

extinguished, the congressional grant of land based on § 10 of the admitting Act necessarily implied that the Rosebud reservation had been diminished. *See id.* at 599-601. This precise logic applies in this case, as well: the grant of land for common schools in the 1894 Act – which contains the identical language as § 10 of the admitting Act – could not have been based on § 10 of the admitting Act if the Yankton reservation had not been diminished. This provision, therefore, strongly supports diminishment.[35]

## III.

The United States Supreme Court has found diminishment of a reservation even where Congress has not made its intent to diminish explicit by including language of cession of land for a sum certain in an allotment statute. In *Solem*, the Court stated that

> explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment. When events surrounding the passage of a surplus land Act – particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress – unequivocally reveal a widely held, contemporaneous

[35] The majority asserts that this provision has "considerably less force" because the reserved sections were explicitly made " 'subject to the laws of the State of South Dakota.' " Maj. Op.at 21 (quoting 1894 Act). I disagree, and find it somewhat illogical to infer a grant of jurisdiction to a tribe over ceded lands because of an explicit grant of jurisdiction to the State of South Dakota over the ceded lands.



> understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation. . . .

465 U.S. at 471 (citations omitted). The legislative history of the 1894 Act contains striking passages which clearly anticipated the termination of tribal governance; *see, e.g.*, S. Exec. Doc. 27 at 19 ("and now that [the Yankton Indians] have been allotted their lands in severalty and have sold their surplus land – the last property bond which assisted to hold them together in their tribal interest and estate – their tribal interests may be considered a thing of the past") (Report of the Yankton Indian Commission, recommending that South Dakota be given funds to ensure access by Yankton Indians to state courts). *See also id.* at 48 ("It might be, after you sold your lands, you could have this reservation organized as a separate county. If this could be done – I do not say it can – you could govern your own people in your own way, *so long as you obeyed the laws of the State.*") (statements by government negotiator to Yankton tribal members, emphasis added).[36]

[36] Even assuming that mere legislative history could rebut the almost insurmountable presumption of diminishment created by Articles I and II of the 1894 Act, there is nothing in the legislative history which contradicts the diminishment of the reservation. Although the district court referred to a letter in the legislative history which it believed to support the continued reservation status of the ceded lands, *see Yankton Sioux*, 890 F. Supp. at 883-86 (quoting S. Exec. Doc. No. 27 at 5), it is apparent that the district court made an erroneous interpretation. The letter relied on by the district court stated

In addition, "events that occurred after the passage of a surplus land Act" may support a finding of diminishment. *Solem*, 465 U.S. at 471. These "events" include how "local judicial authorities dealt with unallotted open lands." *Id.*[37] In this case, the South Dakota Supreme Court

---

that " 'the treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof.' " *Id.* at 883-84 (quoting S. Exec. Doc. 27 at 5). It is clear, and the parties agree, *see* Appellant's Motion to Enlarge Record at 1-2; Appellee's Response to Motion to Enlarge Record at 2, that this letter referred to the Treaty of 1858. The district court, however, misinterpreted this as a reference to the 1892 Agreement: "Most importantly, Armstrong also observed that the Agreement 'makes no provision regarding the cession or relinquishment of the reservation or any portion thereof.' " *Yankton Sioux*, 890 F. Supp. at 885-86 (emphasis deleted) (quoting S. Exec. Doc. No. 27 at 5). The only "Agreement" involved in this case, the 1892 Agreement, contained Article I, which expressly provided for the cession of a portion of the Yankton reservation. This fundamental error in the district court's interpretation of the legislative history of the 1894 Act substantially undermines its determination that the Yankton Sioux Reservation was not diminished.

[37] Treatment of the area by Congress and the Executive may also have some interpretive value. *See Solem*, 465 U.S. at 471. The United States Supreme Court has, however, typically held this evidence in low regard. In *Hagen*, the Court noted that "the views of a subsequent Congress form a hazardous basis of inferring the intent of an earlier one." 114 S. Ct. at 970 (citation and quotations omitted). In *Solem*, the United States Supreme Court noted that:

> The subsequent treatment of the Cheyenne River Sioux Reservation by Congress, courts, and the Executive is so rife with contradictions and inconsistencies as to be of no help to either side. . . . [Ample] examples pointing in both directions leave one with the distinct impression that subsequent



has consistently held that the Yankton Sioux Reservation has been diminished. *See, e.g., State v. Thompson*, 355 N.W.2d 349 (S.D. 1984); *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977); *State v. Williamson*, 211 N.W.2d 182 (S.D. 1973); *Wood v. Jameson*, 130 N.W.2d 95 (S.D. 1964).[38] While

---

> Congresses had no clear view whether the opened territories were or were not still part of the Cheyenne River Reservation. A similar state of confusion characterizes the Executive's treatment of the Cheyenne River Sioux Reservation's opened lands.

465 U.S. at 478-79. *See also Rosebud*, 430 U.S. at 605 n.27 (the "sporadic, and often contradictory, history of congressional and administrative actions in other respects carries but little force"). The examples culled from the record by both the majority, *see* Maj. Op. at 27-33, and the district court, *see Yankton Sioux*, 890 F. Supp. at 886-87, are similarly either "merely passing references," *Hagen*, 114 S. Ct. at 970 (citations and quotations omitted), or "rife with contradictions." *Solem*, 465 U.S. at 478.

[38] The majority dismisses the case law of the South Dakota Supreme Court by asserting that it does "not show full development of the issues or the analytical approach required by the United States Supreme Court." Maj. Op. at 22. I disagree. In *State v. Thompson*, 355 N.W.2d 349 (S.D. 1984), the South Dakota Supreme Court applied the analysis provided by the United States Supreme Court in *DeCoteau* and in *Rosebud*, and upheld its earlier determination that the Yankton Reservation had been diminished. *See id.* at 350-51. While the South Dakota Supreme Court's analysis in *Thompson* is considerably briefer than that performed by the majority in the instant case, I do not believe that accuracy can necessarily be measured by volume.

The majority also notes that the South Dakota Supreme Court was once reversed by the United States Supreme Court after incorrectly finding that a reservation had been diminished. *See* Maj. Op. at 22 n.20 (citing *State v. Janis*, 317 N.W.2d 133 (S.D. 1982), *abrogated in relevant part, Solem*, 465 U.S. at 466 (affirming contrary decision in *Bartlett v. Solem*, 691 F.2d 420 (8th Cir. 1984))). I remind the majority that, while we were right and the

the Yankton tribe has not "exercised civil jurisdiction, particularly environmental regulation, over Indians or non-Indians beyond its trust lands," *Yankton Sioux*, 890 F. Supp. at 888, by contrast, "the State of South Dakota has exercised jurisdiction over mining, solid waste disposal, and hazardous materials on non-Indian lands located within the 1858 exterior boundaries of the Yankton Sioux Reservation." *Id.* Indeed, South Dakota has exercised civil and criminal jurisdiction over tribal members in the ceded lands for the past century. *See id.* at 887. Although this exercise of jurisdiction may not be dispositive, it substantially supports a finding of diminishment. *See, e.g., Hagen*, 114 S. Ct. at 970 ("This 'jurisdictional history,' as well as the current population situation in the Uintah Valley, demonstrates a practical acknowledgement that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area."); *see also Rosebud*, 430 U.S. at 604 ("[T]he fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as a part of the 'jurisdictional history.' "); *DeCoteau*, 420 U.S. at 449 ("Until the Court of

---

South Dakota Supreme Court was wrong in *Solem*, it was the South Dakota Supreme Court's finding of diminishment which was upheld, while this Court's conclusion that a reservation was not diminished was reversed, by the United States Supreme Court in *DeCoteau*. *See* 420 U.S. at 449 (affirming *DeCoteau v. District County Court*, 211 N.W.2d 843 (S.D. 1973), and reversing *United States ex rel. Feather v. Erickson*, 489 F.2d 99 (8th Cir. 1973)).



Appeals altered the status quo, South Dakota had exercised jurisdiction over the unallotted lands of the former reservation for some 80 years.").

Federal courts have also usually considered the Yankton reservation to have been diminished. In *Perrin v. United States*, 232 U.S. 478 (1914), a white merchant living on ceded lands within the boundaries of the 1858 Yankton reservation was convicted of selling alcohol, in violation of the 1894 Act and a related statute. The Court, after noting that "[t]he power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation . . . does not admit of any doubt," *id.* at 482, went on to analyze whether Congress had authority to regulate alcohol "upon ceded lands formerly included in the Yankton Sioux Indian Reservation." *Id.* at 480. The Court referred to the "original reservation," *id.* at 486, and quoted case law that "[i]f liquor is injurious to [Indians] inside of a reservation, it is equally so outside of it." *Id.* at 484 (quoting *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 195 (1876)). While not reaching a specific holding, the United States Supreme Court clearly treated the Yankton Sioux Reservation as diminished.[39] *See also*

---

[39] In addition, cases citing to *Perrin* have assumed that the Yankton reservation had been diminished. *See, e.g., United States v. Mazurie*, 419 U.S. 544, 554 (1975) (*Perrin* involved land that "originally had been included in the Yankton Sioux Indian Reservation, but had been ceded to the United States."); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 159 (1973) (Douglas, J., dissenting) ("In the liquor cases the Court held that it reached acts even off Indian reservations in areas normally subject to the police power of the States." (citing to *Perrin*)); *Johnson v. Gearlds*, 234 U.S. 422, 444-45 (1914) (*Perrin* involved "ceded lands formerly included in the Yankton Sioux Indian reservation in the State of South Dakota.").

*Weddell v. Meierhenry*, 636 F.2d 211, 213 (8th Cir. 1980) (noting that community within the 1858 boundaries of the reservation was not a "dependent Indian community") (denying habeas relief to Yankton tribal member convicted in the South Dakota state court for crimes committed on ceded lands), *cert. denied*, 451 U.S. 941 (1981); *Yankton Sioux Tribe v. United States*, 623 F.2d 159, 165 (Ct. Cl. 1980) ("These final boundaries of the Yankton Sioux Reservation were respected by both parties for more than three decades up until the 1892 Agreement changed those boundaries by the cession at issue in this case.") (awarding additional compensation for lands ceded by 1894 Act).

## IV.

Under the explicit terms of the 1894 Act and in light of controlling United States Supreme Court precedent, it is clear that the 53rd Congress intended to change the Yankton Sioux Reservation's boundaries and to remove tribal authority over lands ceded in the 1894 Act, and that the 1894 Act therefore diminished the Yankton Sioux Reservation. While I understand the majority's desire to "remake history," *DeCoteau*, 420 U.S. at 449, and to redraft legislation which has arguably had unfortunate results, *see, e.g.*, Maj. Op. at 8 (noting that "it became clear in the first decades of the twentieth century that the allotment policy was failing"), its rejection of clear congressional intent and its disregard of controlling and contrary Supreme Court precedent cannot be condoned. I respectfully dissent.



A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

| | |
|---|---|
| The YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members, and DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,<br><br>Plaintiffs,<br><br>-vs-<br><br>SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a non-profit corporation,<br><br>Defendant. | CIV 94-4217<br><br>MEMORANDUM OPINION AND ORDER<br><br>(Filed June 14, 1995) |

| | |
|---|---|
| SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT,<br><br>Third-Party Plaintiff,<br><br>-vs-<br><br>STATE OF SOUTH DAKOTA,<br><br>Third-Party Defendant. | |

The central issue in this case is whether the Yankton Sioux Reservation, created by the 1858 Treaty between the United States and the Yankton Sioux Tribe, was disestablished and returned to the public domain on August 15, 1894, when the Fifty-Third Congress ratified a December



31, 1892 Agreement with the Yankton Sioux for the sale of surplus lands. The Court holds that the 1894 Act did not disestablish the exterior boundaries of the Yankton Sioux Reservation. The Court also holds, however, that the Yankton Sioux Tribe failed to establish that it may exercise regulatory jurisdiction over the municipal solid waste landfill proposed to be built by Southern Missouri Recycling and Waste Management District on non-Indian land located within the exterior boundaries of the reservation. Finally, the Court holds that federal EPA regulations apply to Southern Missouri's proposed facility, that Southern Missouri will be required to install a composite liner as defined in the federal regulations, and Southern Missouri may proceed to construct the facility with the composite liner at the site selected.

## I. Preservation of the Reservation

"[O]nly Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470, 104 S.Ct. 1161, 1166 (1984). In determining whether a reservation has been diminished or disestablished, this Court must apply the analytical structure set out in the Supreme Court precedents, looking primarily to three factors. *See Hagen v. Utah*, ___ U.S. ___, 114 S.Ct. 958, 96[illegible] (1994); *Solem*, 465 U.S. at 470, 104 S.Ct. at 1166. The equities of the situation cannot, under established precedent, be given any consideration in determining the outcome from this analysis. The most probative evidence is the language used to open the Indian lands to settlement. *Hagen*, ___ U.S. ___, 114 S.Ct. at 965. "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly

suggests that Congress meant to divest from the reservation all unallotted opened lands." *Solem*, 465 U.S. at 470, 104 S. Ct. at 1166; *DeCoteau v. District County Court*, 420 U.S. 425, 444-45, 95 S.Ct. 1082, 1092-93 (1975). "[A] statutory expression of congressional intent to diminish, coupled with the provision of a sum certain payment, would establish a nearly conclusive presumption that the reservation had been diminished." *Hagen*, ___ U.S. ___, 114 S.Ct. at 965-66. Secondly, the Court must consider the historical context surrounding the passage of the surplus land Act, looking more carefully to the evidence of the contemporaneous understanding of the Act rather than to matters occurring after passage of the Act. *Id.* Finally, the Court may explore whether diminishment occurred *de facto*, by considering whether the opened area was settled by non-Indians and has now lost its Indian character. *Id.*; *Solem*, 465 U.S. at 471, 104 S.Ct. at 1166. The Court will not lightly find diminishment or disestablishment, and the Court must resolve any ambiguities in favor of the Indians. *Hagen*, ___ U.S. ___, 114 S.Ct. at 965. Before considering the language of the 1892 Agreement, the Court will reconstruct the events that preceded negotiation of the 1892 Agreement and consider the historical context of the 1894 ratification of the Agreement.

The evidence presented at trial shows that, in the April 19, 1858 Treaty, 11 Stat. 743, (Pl. Ex. 1), the Yankton Sioux ceded and relinquished to the United States:

> all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof, situated and described as follows, to wit – Beginning at the mouth of the Naw-izi-wa-koo-pah or Chouteau



> River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres.

The Yankton Sioux were to have exclusive occupation of the reservation lands, along with unrestricted use of the red pipestone quarry in the State of Minnesota. A land survey later conducted revealed that 430,495 acres were included in the area described by the 1858 Treaty and reserved to the Yankton Sioux. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 5 (1894). (Pl. Ex. 5.) The land mass comprising the 1858 Yankton Sioux Reservation is located in the central to southeastern portion of Charles Mix County, South Dakota.

In the 1858 Treaty, the Yankton Sioux relinquished and abandoned all claims and complaints growing out of any and all treaties previously made by them or other Indian Tribes, except for their claim to annuity rights under the September 17, 1851 Treaty of Laramie. In return for the cession of land and release of claims, the United States agreed to protect the Yankton Sioux in their "quiet and peaceable possession" of the tract reserved to them. The government also agreed to pay the Yankton Sioux or to expend for their benefit, starting the year of their settlement upon the reservation, the total sum of $1.6 million in annuities over a period of fifty years. The government also agreed to expend additional amounts during the first year of the Tribe's relocation for the purchase of stock, agricultural implements, and fencing,

and for the construction of houses, schools, and other buildings.

In the years that followed, the federal government did not provide all of the financial assistance promised. To compound this problem, the northern plains region experienced extreme weather cycles of prolonged drought and devastating flood, leaving the Yankton Sioux desperate for cash and direct assistance. The Yankton Sioux generally did not want to become involved in the Great Sioux War, and the Tribe suffered inner turmoil during this period. Some members of the Yankton Sioux Tribe served as scouts for federal troops. The growing population of white farmers, businessmen, and railroad men began pressuring federal government officials to open the surplus lands of the Yankton Sioux Reservation for settlement.

By passage of the General Allotment Act on February 8, 1887 (Dawes Act), 24 Stat. 388, Congress attempted to reconcile the federal government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon tribal lands. Congress determined that tracts of reservation land should be allotted to individual tribal members and, with the Tribe's consent, the surplus lands should be sold to white settlers, with the proceeds of these sales dedicated to the benefit of the Indians. This new policy of Congress sought to encourage the Indians to adopt the ways of the white settlers and thereby become socialized into the white culture. Faced with all of these pressures, the Yankton Sioux split into three factions: those who wished to accommodate by selling the surplus lands, those who were ambivalent about any



such sale, and those who strongly opposed the sale of surplus lands.

Of the 430,495 acres of land comprising the 1858 Yankton Sioux Reservation, 167,325 acres were allotted and patented to the Indians under the Dawes Act. By early 1894, allotments under the Act of February 28, 1891, 26 Stat. 594, had been made in the field, but those allotments had not been examined and approved. The federal government estimated that some 95,000 additional acres had been allotted after passage of the 1891 Act, leaving surplus lands of approximately 168,000 acres. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 5 (1894); (Pl. Ex. 5.)

In 1892 the Secretary of the Department of the Interior appointed three members to serve on the Yankton Indian Commission to negotiate the sale of the surplus land owned by the Yankton Sioux. (Pl. Ex. 28.) These three commissioners were John J. Cole, J.C. Adams, and Dr. W.L. Brown; however, Dr. Brown resigned from the Commission before the negotiations were completed, and his replacement, L.W. French, was never qualified to act as a Commissioner and took no part in the negotiations. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 7-8, 34 (1894); (Pl. Ex. 5.) The Commission arrived at the Yankton Sioux Reservation on October 1, 1892, and began negotiating for the sale of the surplus lands at tribal councils called for that purpose. The transcribed minutes of these tribal councils reveal that the Commissioners encouraged the Yankton Sioux to voice their concerns and opinions, and that many spoke out, both for and against the sale. *Id.* at 47-81.

The Commission and the tribal members discussed at length whether the Tribe should cede the land in trust for later appraisal and sale to individual buyers or whether the Tribe should cede the land in a direct sale to the federal government. The Agreement ultimately reached provided for direct sale to the government. *Id.* at 12. The negotiators had extensive difficulty in establishing a price for the ceded land, and it was claimed that price was "[t]he only real grounds for opposition." *Id.* at 22. The Indians wanted no less than $6.00 per acre for the surplus lands; the Commission reported the Indians thought their lands should bring "fabulous prices." *Id.* at 13. The Commission and the required majority of the males of the Tribe finally agreed to a cession of the land for the fixed price of $600,000, which amounted to about $3.60 per acre. The Commission reported to the Secretary of the Interior that this figure was "as low as these lands could be purchased from them without coercion, and about what they think they should receive." *Id.* at 14. Aside from the issue of price, some time was taken, according to Commissioner John J. Cole, in preparing both the rough draft and the final version of the 1892 Agreement.

> In drawing the treaty we have consulted with your missionaries almost daily, submitting to them our work and asking for their assistance in this matter. After making a complete rough draft of the treaty, we on the 10th instant submitted it to Secretary Noble for his consideration and approval.

*Id.* at 83-84. The changes Secretary Noble requested were made and the Agreement was then submitted to the missionaries, including John P. Williamson. *Id.* at 84.



In its report on the negotiations, the Commission also acknowledged that obtaining the sale of the surplus lands was "but a small part of our mission and of minor importance to both the Indians and the Government, the provisions in connection therewith for the future welfare of the Indians being of greater importance to them and to the Government than the sale of their surplus lands." *Id.* at 17. The Commission reported that the Indians expressed the fear that opening of the Yankton Reservation to settlement by white people would bring with it the establishment of drinking saloons, to the great injury of their people. To alleviate the Tribe's concern, Article XVII, limiting the sale and distribution of liquor on the ceded lands, was included in the Agreement. *Id.* at 21. The Commissioners also noted that it was customary in negotiating with Indians to give a medal to the chiefs, "but as the Yanktons are so far advanced toward individual citizenship, we thought it best to meet this requirement as in Article VII" by giving a $20 gold piece to each adult male of the Tribe. *Id.* at 19.

The negotiations culminated on December 31, 1892, in a final written agreement for the sale of the surplus land to the federal government at a fixed price, (State Ex. 601), and by March 1893, when the Commissioners left the Yankton Sioux Reservation to return to Washington, the required majority of adult male members of the Tribe had signed the Agreement.[1] *Id.* at 7. The Commission

---

[1] The 1892 Agreement contains the following important provisions:

ARTICLE I. "The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all

reported that, when agreement with the Tribe was reached, the Commission:

> called together small parties of the chiefs, headmen, and leaders, and conferred with them in drawing the agreement, and after it was written, we continued to call such small councils, to whom we read and explained the agreement for the benefit of the tribe. This work was continued from day to day until the 21st day of January, when we called a full council of the tribe, sending couriers to all parts of the reservation to notify the Indians that we would submit an agreement for their approval. The agreement was submitted, read, interpreted and explained to a full council, at the close of which we took between fifty and sixty signatures to it. Councils for signature were continued from day to day until March 8, when, having a safe majority, we

---

their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid."

ARTICLE II. "In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000), as hereinbefore provided for."

ARTICLE XVIII. "Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858." (Pl. Exs. 2, 5.)



> closed up the work of the commission on the reservation.

*Id.* at 11. Of the 458 male tribal members eligible to vote on the Agreement, 255 members signed it. *Id.* at 21. One-half of the white men married to Indian women gave their consent to the Agreement by signing on a separate page attached to the Agreement. *Id.* at 16-17. United States Interpreter C.F. Picotte certified that the Agreement "was read verbatim and carefully and correctly interpreted in an open council of the tribe," and that the Agreement was "also read and interpreted to the chiefs and to various parties of the headmen, and all members of the tribe had a good understanding of the various provisions of the agreement before signing it." *Id.* at 33.[2]

---

[2] In contradiction to this, Indian Agent E.W. Foster of the Yankton Agency told the Commissioner of Indian Affairs of the Department of the Interior, in a May 1893 letter and in his 1893 annual report, that the Yankton Indian Commissioners read the 1892 agreement in public once, they did not leave a copy in South Dakota when they left the reservation, and many times the Indians asked Foster to show them the document, but he did not have a copy. *See* Report of the Commissioner of Indian Affairs, Dept. of the Interior at 311 (Sept. 14, 1894); (Pl. Ex. 10); May 2, 1893 letter of E.W. Foster (Pl. Ex. 26). It appears from the record that Agent Foster opposed the sale of surplus lands, and he told the Tribe at the first tribal council with the negotiators in October 1892 that they did not have to sell their surplus lands unless they wanted to. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 48 (1894); (Pl. Ex. 5). The Yankton Sioux apparently did not trust Foster, however, for the Indians made it known that they "were willing to negotiate for sale of surplus as long as Sgt. Foster [had] no hand in such negotiations." (Pl. Ex. 28.)

The Report of the Yankton Indian Commission, dated March 31, 1893, was filed in the Department of the Interior on May 27, 1893. Annual Report of the Commissioner of Indian Affairs dated September 16, 1893. (Pl. Ex. 10.) The Commission reported to Washington officials that "[t]here will be no basis for misunderstanding or discontent in carrying out this agreement with the Yanktons, for everything was done openly and aboveboard, and they well understood every provision of the agreement which they signed, and they signed with the greatest possible deliberation." *Id.* at 24. The Yankton chiefs, headmen, and certain members of the Tribe sent letters and petitions to Congress in December 1893 and in January and March 1894 acknowledging that the agreement negotiations had occurred "aboveboard" and that the signers willingly agreed to the Agreement's provisions. They urged Congress to ratify the Agreement quickly so that the Indians could receive from the federal government the money promised to them. S.Rep. Accompanying S. 1538 from the Committee on Indian Affairs at 2 (February 1, 1894); (Pl. Ex. 7); March 2, 1894 Letter to the Chairman, Committee Indian Affairs (State's Exs. 606-07); (Pl. Ex. 21.)

The legislative history of the Agreement leaves no doubt, however, that the faction of the Yankton Sioux opposed to the land sale vehemently worked against the Agreement. Two federal investigators were sent separately to the Yankton Sioux Reservation in 1893 to investigate allegations of fraud in the procurement of signatures on the Agreement. Indian Inspector John W. Cadman reported in November 1893 that he had uncovered only one incident of possible undue influence, but that he did not believe such had occurred in that case. He



also reported that some tribal members who had signed the Agreement wished to change their minds, while others wished to sign the Agreement for the first time. S. Exec. Doc. No. 27, 53rd Cong. 2d Sess. at 35 (1894); (Pl. Ex. 5; State Ex. 605) Special Agent Cooper also found no evidence of coercion by the Commissioners in reaching the Agreement. *Id.* at 95.

In a letter to the Secretary of the Interior, subsequently referred to Congress with the 1892 Agreement, the Acting Commissioner of Indian Affairs, Frank C. Armstrong, stated that the Yankton Indian Commission was appointed in 1892

> [t]o enable the Secretary of the Interior to negotiate with any Indians for the surrender of any portions of their reservation, etc.
>
> By the first article of the agreement the said Indians cede, sell, relinquish, and convey to the United States, all their claim, right, title, and interest, in and to all the unallotted lands within the limits of their reservation in South Dakota.

S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 2 (1894). (Pl. Ex. 5.) The letter also states, however, that "[t]he treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof." *Id.* at 5. The preamble to the bill to ratify the 1892 agreement nonetheless stated that the Yankton Sioux Tribe "is willing to dispose of a portion of the land set apart and reserved to said tribe, by the first article of the treaty" of April 19, 1858. *Id.* at 26.

The February 1, 1894 Senate Report from the Committee on Indian Affairs, accompanying S. 1538, recommended ratification of the Agreement with the Yankton Sioux because "[t]he occupation of the land released by them by actual settlers under the homestead law bringing them in close contact with the frugal, moral, and industrious people who will settle there will stimulate individual effort and make their progress much more rapid than heretofore." (Pl. Ex. 7; State Ex. 608.) *See also* House Report to Accompany H.R. 6216 (Mar. 10, 1894); (Pl. Ex. 8; State Ex. 609.) Congress ratified the 1892 Agreement with the Yankton Sioux on August 15, 1894. 28 Stat. 314-19. One month later, the Commissioner of Indian Affairs commented in his annual report:

> The agreement concluded with the . . . Yankton Sioux in South Dakota, concluded December 31, 1892, . . . referred to in my last annual report, [was] ratified by the act of Congress approved August 15, 1894 – the Indian appropriation act. Under these agreements some 880,000 acres of land *will be restored to the public domain* for disposition as provided in said act."

Annual Report of Commissioner of Indian Affairs, dated September 16, 1894, at 26 (emphasis added). (Pl. Ex. 11.)

On May 16, 1895, President Grover Cleveland issued a Proclamation opening for settlement the unallotted lands ceded by the Yankton Sioux to the United States, noting that "the said Yankton tribe of Sioux or Dacotah Indians, for the consideration therein mentioned, ceded, sold, relinquished, and conveyed to the United States, all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set



apart to said tribe by the first article [of the 1858 treaty]." Annual Report of the Commissioner of the General Land Office for The Fiscal Year Ending June 30, 1895 at 120-21; (Pl. Exs. 6, 35; State Ex. 602.) The unallotted lands were officially opened for settlement at 12 noon on May 21, 1895. *Id.* at 5. (Pl. Ex. 6.) Non-Indians rapidly settled and purchased the lands ceded by the Yankton Sioux. (Pl. Ex. 58, 61-64, 66.) In fact, some settlers squatted on the lands without authority even before the issuance of the presidential proclamation opening the land for settlement. (Pl. Ex. 27.)

With this historical context in mind, the Court now turns to an examination of the "most probative evidence" of diminishment or disestablishment: the language of the Agreement. Article I of the 1892 Agreement provided that the Yankton Sioux

> hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.

In Article II, the United States agreed that,

> [ ]in consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000), as hereinbefore provided for.

These two Articles of the Agreement, taken together and without consideration of Article XVIII, plainly indicate that the Yankton Sioux were willing to convey to the United States, for payment of a sum certain, all of their

interest in all of their unallotted lands. *See DeCoteau*, 420 U.S. at 445, 95 S.Ct. at 1093. The explicit cession language used in Article I, coupled with the agreement to sell lands for a sum certain in Article II, was "precisely suited to [the] purpose [of disestablishment]." *Id. See also, Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 592, 97 S.Ct. 1361, 1366 (1977). If Article XVIII had not been included in the Agreement, the language utilized in these two Articles would establish "a nearly conclusive presumption that the reservation had been diminished." *See Hagen*, ___ U.S. ___, 114 S.Ct. at 965-66. *See also Perrin v. United States*, 232 U.S. 478, 480, 34 S.Ct. 387 (1914) (referring to the "ceded lands formerly included in the Yankton Sioux Indian Reservation" when construing Article XVII, the liquor provision, of the 1892 Agreement with the Yankton Sioux). The fact that lands were considered by the Court in *Perrin* as ceded does not mean that the boundaries were diminished, as that issue was not addressed.

The Court must further consider, however, the meaning and impact of Article XVIII:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

The Court focuses upon the phrases "[n]othing in this agreement shall be construed to abrogate the treaty



of April 19th, 1858," and "all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made[.]" The extensive post-trial research of the parties to this case reveals no other treaty or agreement made between the United States and an Indian tribe that includes this identical language. There are treaties and agreements that include savings clauses; however, the language used in such clauses is far from uniform. The parties cite to the Court numerous examples of savings clauses in other agreements providing that treaty provisions shall remain in force or continue in force to the extent those treaty provisions are not inconsistent with the provisions of a subsequent act. (Doc. 97 at 5-8; Doc. 94 at 4-6, 9-12.) The State also cites decisions of the United States Supreme Court in which such savings clauses did not affect the Court's ultimate finding of reservation diminishment or diminution of special Indian rights. *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 105 S.Ct. 3420 (1985); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361 (1977); *Chippewa Indians of Minnesota v. United States*, 301 U.S. 358, 57 S.Ct. 826 (1937); *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 57 S.Ct. 244 (1937). The Court has considered the other clauses and cases cited by the parties, but finds them to be of little help in resolving this case. No other clause contains language as forceful as Article XVIII.

The Court finds that the phrase in Article XVIII that "all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made," when read with the clear cession and sale clauses of Articles I and II, creates an

internal inconsistency in the 1892 Agreement. Construing this ambiguity in favor of the Tribe as the Court must do, *see Hagen*, ___ U.S. ___, 114 S.Ct. at 965, the Court concludes, as the Tribe argues, that the effect of Article XVIII is to incorporate by reference the exterior boundaries of the Yankton Sioux Reservation as set out in the 1858 treaty.

The circumstances surrounding the ratification of the 1892 Agreement fail to establish a clear congressional purpose to disestablish the reservation boundaries. In referring the 1892 Agreement to Congress for ratification, Acting Commissioner of Indian Affairs Frank Armstrong reminded Congress that the Yankton Indian Commission was appointed under the authority of the Act of July 13, 1892, so that the Secretary of the Interior could "negotiate with any Indians for the surrender of any portions of their reservation." S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 2 (1894) (emphasis added). (Pl. Ex. 5.) Armstrong then informed Congress that, by Article I of the 1892 Agreement, "the said Indians cede, sell, relinquish, and convey to the United States, all their claim, right, title, and interest in and to all the unallotted lands *within the limits of their reservation* in South Dakota." *Id.* (emphasis added). He informed Congress that "Article XVIII provides that nothing in the agreement shall be construed to abrogate the treaty of April 19, 1858, and that the Yankton Indians shall continue to receive their annuities under said treaty." *Id.* at 4. Most importantly, Armstrong also observed that the Agreement "*makes no provision regarding the cession or relinquishment of the reservation* or any portion thereof." S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 5 (1894) (emphasis added). (Pl. Ex. 5.) The transcribed



minutes of the tribal councils held by the Yankton Indian Commission to negotiate the Agreement with the Yankton Sioux, which are included in the legislative history of the ratifying Act, do not divulge any discussion that might have taken place as to the meaning the parties to the Agreement gave to Article XVIII, and there is no discussion as to whether the Yankton Sioux or the negotiators believed the 1858 boundaries of the reservation would change. *Id.* at 47-97. John P. Williamson was one of the missionaries to whom the final version of the 1892 Agreement was submitted.[3] In his letter of January 3, 1893, from Greenwood, South Dakota, on the reservation, Rev. Williamson wrote: "I have read the agreement you present the Yankton Indians . . . [and in conclusion] and further there is no cause for apprehension that this agreement will in any way interfere with the treaty of 1858." S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 84 (1894). (Pl. Ex. 5.) The Court can find no other mention of Article XVIII in the legislative history of the ratification Act.

The Court therefore concludes that Congress reasonably could have understood, by reason of the communications it received from the Commissioner of Indian

---

[3] Rev. John P. Williamson was a well regarded Presbyterian missionary among the Yankton Sioux. *See, e.g.*, Eastman, *From the Deep Woods to Civilization*, 48 (Little, Brown and Company 1916). Rev. Williamson lived near the Yankton Agency at Greenwood from 1869 to 1916 and was the first resident missionary of any denomination among the Indians within the bounds of what is now South Dakota and interceded for the Yankton Sioux with President Grant in 1873. Sister Mary Claudia Duratschek, *Crusading Along Sioux Trails*, 268, 275 (Grail Publication 1947).

Affairs through the Secretary of the Interior, particularly in light of no other indications to the contrary, that the Yankton Sioux intended to cede the surplus lands within the exterior boundaries of the reservation, but that they did not intend to relinquish the boundaries established in the 1858 treaty. The Court's conclusion in this regard is supported by the fact that Congress stated in the preamble to the ratification bill that the Yankton Sioux Tribe "is willing to dispose of a portion of the land set apart and reserved to said tribe, by the first article of the treaty" of April 19, 1858. *Id.* at 26. Congress did not expressly state in the ratification bill that the boundaries would be diminished or disestablished, and such congressional intent is not clear from the surrounding circumstances and legislative history. *See Solem*, 465 U.S. at 474, 104 S.Ct. at 1168 ("Nowhere else in the [Cheyenne River] Act is there specific reference to the cession of Indian interests in the opened lands or any change in existing reservation boundaries.") Without such clear congressional intent, the general rule applies that doubtful expressions must be resolved in favor of the Tribe. *See DeCoteau*, 420 U.S. at 445, 95 S.Ct. at 1093 (once Congress establishes a reservation, all tracts included within it remain part of the reservation until separated from it by Congress).

Historical events following ratification of the Agreement are not entirely at odds with a determination that the exterior boundaries remained intact, although there is some evidence that the reservation was treated as if it had been diminished or disestablished. *See Hagen*, ___ U.S. ___, 114 S.Ct. at 965-66; *Solem*, 465 U.S. at 471, 104 S.Ct. at 1166. Illustrative of this latter type of evidence are



maps issued by private publishers in 1904, 1906, and 1912 which treated the Yankton Sioux Reservation as if its exterior boundaries no longer existed. (State Exs. 630-32.) Also, the State introduced into evidence a February 21, 1921 letter regarding construction of a spillway and drainage ditch to maintain the level of Lake Andes, in which Secretary of the Interior Payne stated that Lake Andes is "within the former Yankton-Sioux Indian Reservation." (State Ex. 665.) Having carefully reviewed all similar evidence presented by the State, (State's Exs. 604, 627-28, 651-52, 667-68), the Court finds that the evidence is insufficient to prove that *de facto* diminishment or disestablishment occurred.

One month after Congress ratified the Agreement, the Commissioner of Indian Affairs stated that the effect of the Agreement was to return land to the public domain "as provided in said act." Annual Report of Commissioner of Indian Affairs, dated September 16, 1894, at 26. (Pl. Ex. 11.) A return of surplus lands to the public domain is consistent with a conclusion that the Ratification Act opened the surplus lands for settlement only and did not change the reservation boundaries. *See Solem*, 465 U.S. at 474, 104 S.Ct. at 1168. Upon ratification, President Cleveland opened the unallotted lands for settlement, noting in his Proclamation that the Yankton Sioux had ceded and relinquished to the United States all the unallotted lands "within the limits of the reservation set apart to said tribe by the first article [of the 1858 treaty]." Annual Report of the Commissioner of the General Land Office for The Fiscal Year Ending June 30, 1895 at 120-21. (Pl. Exs. 6, 35; State Ex. 602.) This proclamation is consistent with the conclusion that the boundaries remained

intact while the unallotted lands were opened to settlement.

White settlers rapidly entered and settled the opened areas of the reservation. Census data show that the population of Charles Mix County increased by 103.4 percent between 1890 and 1900, and of the 8,498 persons residing in Charles Mix County in 1900, only 1,483 were Indian. (State Exs. 612-13.) By 1910, the Indian population in Charles Mix County had dropped to 1,345, and Indian land holdings had dropped dramatically by 1914. (Pl. Exs. 22, 25; State Exs. 613, 623.) This evidence tends to show that the opened lands quickly lost their Indian character. However, of particular concern to the Yankton Sioux during this time period were attempts by the Commissioner of School and Public Lands for the State of South Dakota to select for State purposes land ceded in the 1892 Agreement, as the Yankton Sioux preferred stable white settlers for neighbors rather than cowboys who would graze livestock on lands leased from the State. (Pl. Exs. 17, 19-20, 27, 56, 76.) This is some evidence that the Yankton Sioux believed that the reservation boundaries had not changed and that they could exercise some influence within Congress or executive agencies to determine the use to be made of the opened lands.

Official government reports, documents, and maps issued in the years between 1894 and 1923 sometimes referred to the Yankton Sioux Reservation as if the 1858 exterior boundaries remained intact, and at other times treated the area within the 1858 exterior boundaries as "allotted or opened" or as a "former reservation." (Pl. Exs. 30, 34-55; State Exs. 612-14, 617, 619-22, 625-26, 666.) Thus, the government itself did not take a clear position



as to whether the reservation had been diminished or disestablished. In a letter dated May 13, 1910, the Commissioner of Indian Affairs informed the Yankton Sioux that lands ceded under the 1892 Agreement became public lands, (State Ex. 664), but this is not inconsistent with a conclusion that the reservation boundaries remained intact. Beginning as early as 1895, state courts exercised civil and criminal jurisdiction in the opened area of the reservation, (State Exs. 633-38); however, this fact in itself does not confirm that the exercise of state jurisdiction was appropriate, nor is it inconsistent with the existence of shared jurisdiction by the state, tribe and federal government within the opened area of an existing Indian reservation. *See Solem*, 465 U.S. at 467, 104 S.Ct. at 1164. Within the last sixty years, the Yankton Sioux Tribe has taken steps to assert tribal jurisdiction, although those efforts have not completely come to fruition.

In 1932 the Yankton Sioux Tribal Business and Claims Committee wrote a Constitution and Bylaws, but this Constitution was silent as to the extent of jurisdiction asserted by the Tribe. (State Ex. 651.) Trial testimony revealed that the Business and Claims Committee was suspended from 1936 through 1965 and did not operate during that time, although two or three other limited purpose committees were developed by tribal members. In 1962 the Yankton Sioux Tribal Business and Claims Committee was re-established and adopted an Amended Constitution and Bylaws, certain sections of which were again amended in 1975. (State Ex. 652.) The Amended Constitution provided that "[t]he territory under which this Constitution shall exist shall extend to all original

Tribal lands now owned by the Tribe under the Treaty of 1858." (*Id.*)

In a Department of Interior Solicitor's Opinion, "Authority Of Yankton Sioux Tribe of South Dakota To Establish A Tribal Court," the Associate Solicitor stated:

> The cession of unallotted lands by the Yankton Sioux Tribe by the Agreement of December 31, 1892, as ratified by the Act of August 15, 1894, 28 Stat. 314, diminished the area over which the tribe might exercise its authority but did not otherwise terminate legislative authority of the tribe; the tribe retained inherent authority to administer justice through a tribal court.
>
> The result of a cession of all unallotted lands was to leave in Indian control lands in a checkerboard pattern. The impracticality of such jurisdiction is recognized. (cases omitted) However, as stated in *De Marrias*, the checkerboard jurisdiction stems from the acts of Congress and therefore had the approval of Congress. *De Marrias* [*v. State of South Dakota*, 206 F. Supp. 549, 551 (D.S.D. 1962), *aff'd*, 319 F.2d 845 (8th Cir. 1963)].

(State Ex. 628 at 4.) Since the mid-1960's, the State of South Dakota has exercised jurisdiction over mining, solid waste disposal, and hazardous materials on non-Indian lands located within the 1858 exterior boundaries of the Yankton Sioux Reservation. (State Exs. 640-46, 647-50.) Plaintiffs presented no evidence that, since 1894, the Tribe has exercised civil jurisdiction, particularly environmental regulation, over Indians or non-Indians beyond its trust lands. Yankton Sioux Tribal Chairman Darrell Drapeau specifically testified that he seeks tribal solid waste regulation over Indians only, and not over



non-Indians located on lands within the 1858 exterior boundaries of the Yankton Sioux Reservation.

Although there is evidence that governmental and private entities often treated the Yankton Sioux Reservation as if it had been diminished or disestablished, the Court holds for the reasons previously stated that the 1892 Agreement, ratified by Congress in 1894, did not disestablish or diminish the exterior boundaries of the Yankton Sioux Reservation as set out in the 1858 Treaty.[4]

Nonetheless, "when Congress has broadly opened up . . . land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control." *South Dakota v. Bourland*, ___ U.S. ___, 113 S.Ct. 2309, 2318 (1993). Indian tribes retain inherent authority to punish members who violate tribal law, to regulate tribal membership, and to conduct internal tribal relations, but the " 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation[.]' " *Id.* at 2319 (quoting *Montana v. United States*, 450 U.S. 544, 564, 101 S.Ct. 1245, 1258 (1981)). Plaintiffs have provided no evidence to prove that Congress intended to allow the Tribe to assert regulatory jurisdiction over non-Indian lands within the exterior boundaries of the reservation pursuant to inherent sovereignty. The Court also finds that plaintiffs failed to produce sufficient evidence to warrant application of the

---

[4] This holding does not affect the validity of the holding of record title to real estate within the exterior boundaries of the Yankton Sioux Reservation.

second *Montana* exception in this case. *See Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 424, 109 S.Ct. 2994 (1989) (plurality); *Montana*, 450 U.S. at 566, 101 S.Ct. at 1258. Plaintiffs produced no evidence regarding impact of the proposed municipal solid waste landfill on the political integrity, economic security, or health and welfare of the Tribe except for very limited and somewhat contradictory testimony by Tribal Chairman Darrell Drapeau. Accordingly, the Tribe may not assert civil jurisdiction over the municipal solid waste landfill that is proposed to be built on non-Indian land within the exterior boundaries of the Yankton Sioux Reservation.

## II. Regulation of the Municipal Solid Waste Landfill

The Southern Missouri Recycling and Waste Management District, formerly known as the Southern Missouri Waste Management Association, came into existence on February 5, 1992, for the purpose of constructing a municipal solid waste disposal facility in compliance with state solid waste disposal regulations and federal Environmental Protection Agency (EPA) Subtitle D regulations. Faced with a federal mandate to close unregulated town dump sites by October 6, 1995, community leaders formed Southern Missouri to develop a solid waste disposal facility that will serve approximately 25,000 residents located in four counties and numerous communities. Although tribal representatives regularly attended Southern Missouri's meetings, the Yankton Sioux Tribe did not sign the joint powers agreement or become an official member of the organization.



Southern Missouri selected a site for the landfill west of Lake Andes, in Charles Mix County, South Dakota. The site is located on land formerly owned by a non-Indian, Kenneth McBride, within the exterior boundaries of the Yankton Sioux Reservation. Southern Missouri purchased the parcel from McBride and filed an application with the State of South Dakota, Department of Environment and Natural Resources (DENR), to obtain a permit to construct and operate the landfill. Following review of Southern Missouri's application and subsequent submissions, DENR recommended approval of the permit to the Board of Minerals and Environment.

On October 4, 1993, the Yankton Sioux Tribe filed with the Board of Minerals and Environment a Petition For A Contested Case Hearing, a Motion to Intervene, and a Request For An Environmental Impact Statement. (State Ex. 653.) The Board Chairman accepted the petition to intervene and granted party status to the Tribe, but denied the Tribe's request for an Environmental Impact Statement. (State Exs. 654, 656.)

On December 8-10 and December 20, 1993, the Board of Minerals and Environment conducted a lengthy contested case hearing regarding Southern Missouri's application for a permit. The Yankton Sioux Tribe, represented by counsel at the hearing, presented evidence and cross-examined witnesses called by other parties. (State Ex. 675 Tr. Vols. 1-4.) Several of the witnesses who testified at the trial in this action also testified at the state administrative hearing, among them the engineers who designed Southern Missouri's facility and the Tribe's experts, Dr. Henry Mott and Dr. Perry Rahn. The Court finds that the testimony given in the two proceedings is virtually identical.

At the conclusion of the contested case hearing, the Board filed extensive Findings of Fact And Conclusions of Law granting Southern Missouri the requested permit. (State Ex. 657.) Based upon a careful review of the evidence, the Board rejected the concerns raised by the Tribe's experts as to (1) inadequacy of the proposed compacted clay liner; (2) location of major acquifers underlying the site; (3) potential groundwater mounding beneath the site; (4) inadequate drilling of test wells; (5) the presence of fissures or lineaments, as well as sand and gravel lenses, at the site that might assist the migration of leachate into groundwater and acquifers; (6) and the inadequacy of the methane gas and leachate collection systems. The Board specifically found that South Dakota solid waste regulations do not require the installation of a synthetic composite liner over the compacted clay liner, and therefore, the Board did not order its installation. The Board found that the facility will not cause significant adverse effect on wildlife, recreation, endangered species, or aesthetic value; the facility is not located within one thousand feet of water classified for fish life propagation; it is not located within an area where leachate can potentially contaminate groundwater; it is not located within the 100-year flood plain; it is not visible or within one thousand feet of a public park; and it is in an area that does not constitute a potential safety hazard to the public. The Board determined that the permit would be subject to certain conditions attached to it and incorporated by reference. The permit issued to Southern Missouri contains conditions relating to design and construction, monitoring, operations, recordkeeping and reporting, and financial assurance. Particularly, Southern Missouri is



required to conduct soil tests while the compacted clay liner is under construction to assure that the liner will achieve the proposed impermeability rating of 1 x 10 (-7) cm/sec. (State Ex. 659.)

The Tribe did not seek review of the administrative ruling in the state circuit court as permitted by state law. Another party to the contested case hearing called VOTE, which was also represented by the Tribe's attorney, did seek judicial review, and the Sixth Judicial Circuit Court affirmed. (State Ex. 658.) No appeal was taken to the South Dakota Supreme Court. The Tribe then filed this federal lawsuit seeking to enjoin construction of Southern Missouri's solid waste facility.

The Court held in the previous section of this Opinion that the Tribe did not meet its burden to prove at trial that it may exercise civil jurisdiction over this proposed landfill. The Court must nonetheless consider the Tribe's argument that federal EPA regulations apply to this solid waste disposal facility, and not state regulations, because EPA has not delegated to the State of South Dakota its permitting and enforcement authority over lands located within the exterior boundaries of the Yankton Sioux Reservation.

The Tribe is correct that on October 8, 1993, EPA exempted "Indian Country" as defined in 18 U.S.C. § 1151, including the "existing or former" Yankton Sioux Reservation, from its final determination of the adequacy of South Dakota's State/Tribal Municipal Solid Waste Permit Program. 58 Federal Register 52486-52489, October 8, 1993; (State Ex. 661.) On April 7, 1994, however, the EPA published notice of its tentative determination of

adequacy of the State's amended Municipal Solid Waste Permit Program over non-Indian lands, except for "Indian Country" as defined in § 1151, within the boundaries of the Yankton Sioux Reservation. 59 Federal Register 16647-16649, April 7, 1994; (State Ex. 662.)

On November 10, 1994, William Yellowtail, Regional Administrator for the EPA, in a letter to Robert Roberts, Secretary of the South Dakota Department of Environment and Natural Resources, stated EPA's position that federal regulations apply to Southern Missouri's site because the facility lies within the exterior boundaries of the reservation. Yellowtail asserted EPA's view that the federal regulations would require installation of the synthetic liner, although he acknowledged that EPA had yet to make a final decision on the State's amended application for enforcement authority over all non-Indian lands within the exterior reservation boundaries. (Pl. Ex. 69.) In response, on March 14, 1995, the State requested that EPA take no further action on its amended application pending the outcome of this lawsuit. (State Ex. 675 File Vol. 1, Correspondence.) The Tribe has also applied for EPA enforcement authority over lands within the exterior reservation boundaries, and that application is pending before the EPA. (Pl. Ex. 57.)

The Court finds that, until the EPA takes final action to approve or disapprove either the State's or the Tribe's applications, federal EPA regulations apply to Southern Missouri's proposed solid waste disposal facility. The evidence shows that the EPA takes the position that a synthetic liner is required in addition to the compacted clay liner to bring Southern Missouri's design into compliance with Subpart D, 40 C.F.R. § 258.40. The Court will



require Southern Missouri to install a composite liner as defined in 40 C.F.R. § 258.40(b) because a composite liner and leachate collection system is required where noncontainerized leachate derived from the solid waste disposal facility will be recirculated into the cells, as is proposed in Southern Missouri's design and operation. 40 C.F.R. § 258.28(a)(2). Plaintiff's expert, Dr. Henry Mott, testified that his concerns regarding the adequacy of the compacted clay liner and the leachate collection system would be alleviated if Southern Missouri were required to install a composite liner. At trial, Southern Missouri offered to construct the proposed facility with a composite liner. Now that the Court is requiring installation of the composite liner, these concerns are fully addressed.

As Dr. Perry Rahn testified, the EPA regulations do not require a facility design that prepares for a worst case scenario. The Court has carefully considered all of the testimony given by the witnesses at trial regarding the adequacy of the site selection and the design of Southern Missouri's proposed facility. As to all remaining factual issues, this Court makes the same findings as those made by the South Dakota Board of Minerals and Environment. The Court finds credible the testimony of the engineers who designed the facility for Southern Missouri, Brian Bernhardt and John Childs. The Court is convinced that in designing the facility these engineers appropriately considered the concerns raised by the Tribe's experts as to groundwater mounding, sand and gravel lenses, fissures and lineaments, acquifers, test borings, and methane gas collection. All of these matters have been adequately addressed in the design of the facility, which

complies fully with EPA regulations once the composite liner is required. Accordingly,

IT IS ORDERED:

(1) that Congress did not disestablish or diminish the boundaries of the Yankton Sioux Reservation when it ratified the 1892 Agreement with the Yankton Sioux Tribe and therefore, the exterior boundaries of the reservation, as set out in the 1858 Treaty, remain intact.

(2) that plaintiffs failed to establish that the Yankton Sioux Tribe may exercise regulatory jurisdiction over the municipal solid waste landfill proposed to be built by Southern Missouri Recycling and Waste Management District on non-Indian land located within the exterior boundaries of the Yankton Sioux Reservation.

(3) that Southern Missouri Recycling and Waste Management District may proceed with construction of its solid waste disposal facility at the site selected.

(4) that, during construction of the solid waste disposal facility, Southern Missouri will install a composite liner as defined in 40 C.F.R. § 258.40(b).

(5) that all other relief requested by plaintiffs is denied.

Dated this 14th day of June, 1995.

BY THE COURT:

/s/ Lawrence L. Piersol
Lawrence L. Piersol
United States District Judge



ATTEST:

WILLIAM F. CLAYTON, CLERK

BY /s/ Alice R. Raesly
DEPUTY

(SEAL)

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No. 95-2647SDSF

Yankton Sioux Tribe, et al.,
Appellees,
vs.
State of South Dakota,
Appellant.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge Bowman, Judge Magill, and Judge Loken would grant the suggestion.

The petition for rehearing by the panel is also denied.

Judge Wollman took no part in the consideration or decision of this case.

January 6, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

---



* * *

TREATY WITH THE YANKTON SIOUX, 1858

Articles of agreement and convention made and concluded at the city of Washington, this nineteenth day of April, A.D. one thousand eight hundred and fifty-eight, by Charles E. Mix, commissioner on the part of the United States, and the following-named chiefs and delegates of the Yancton tribe of Sioux or Dacotah Indians, viz:

Pa-la-ne-a-pa-pe, the man that was struck by the Ree.
Ma-to-sa-be-che-a, the smutty bear.
Charles F. Picotte, Eta-ke-cha.
Ta-ton-ka-wete-co, the crazy bull.
Pse-cha-wa-kea, the jumping thunder.
Ma-ra-ha-ton, the iron horn.
Mombe-kah-pah, one that knocks down two.
Ta-ton-ka-e-yah-ka, the fast bull.
A-ha-ka-ma-ne, the walking elk.
A-ha-ka-na-zhe, the standing elk.
A-ha-ka-ho-che-cha, the elk with a bad voice.
Cha-ton-wo-ka-pa, the grabbing hawk.
E-ha-we-cha-sha, the owl man.
Pla-son-wa-kan-na-ge, the white medicine cow that stands.
Ma-ga-scha-che-ka, the little white swan.
Oke-che-la-wash-ta, the pretty boy.

(The three last names signed by their duly-authorized agent and representative, Charles F. Picotte,) they being thereto duly authorized and empowered by said tribe of Indians.

ARTICLE 1.

The said chiefs and delegates of said tribe of Indians do hereby cede and relinquish to the United States all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof, situated and described as follows, to wit – Beginning at the mouth of the Naw-izi-wa-koo-pah or Chouteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres. They, also, hereby relinquish and abandon all claims and complaints about or growing out of any and all treaties heretofore made by them or other Indians, except their annuity rights under the treaty of Laramie, of September 17, A.D. 1851.

ARTICLE 2.

The land so ceded and relinquished by the said chiefs and delegates of the said tribe of Yanctons is and shall be known and described as follows, to wit –

"Beginning at the mouth of the Tchan-kas-an-data or Calumet or Big Sioux River; thence up the Missouri River to the mouth of the Pa-hah-wa-kan or East Medicine Knoll River; thence up said river to its head; thence in a direction to the head of the main fork of the Wan-dush-kah-for or Snake River; thence down said river to its junction with the Tchan-san-san or Jaques or James River; thence in a direct line to the northern point of Lake Kampeska; thence along the northern shore of said lake



and its outlet to the junction of said outlet with the said Big Sioux River; thence down the Big Sioux River to its junction with the Missouri River."

And they also cede and relinquish to the United States all their right and title to and in all the islands of the Missouri River, from the mouth of the Big Sioux to the mouth of the Medicine Knoll River.

And the said chiefs and delegates hereby stipulate and agree that all the lands embraced in said limits are their own, and that they have full and exclusive right to cede and relinquish the same to the United States.

ARTICLE 3.

The said chiefs and delegates hereby further stipulate and agree that the United States may construct and use such roads as may be hereafter necessary across their said reservation by the consent and permission of the Secretary of the Interior, and by first paying the said Indians all damages and the fair value of the land so used for said road or roads, which said damages and value shall be determined in such manner as the Secretary of the Interior may direct. And the said Yanctons hereby agree to remove and settle and reside on said reservation within one year from this date, and, until they do so remove, (if within said year,) the United States guarantee them in the quiet and undisturbed possession of their present settlements.

ARTICLE 4.

In consideration of the foregoing cession, relinquishment, and agreements, the United States do hereby agree and stipulate as follows, to wit:

1st. To protect the said Yanctons in the quiet and peaceable possession of the said tract of four hundred thousand acres of land so reserved for their future home, and also their persons and property thereon during good behavior on their part.

2d. To pay to them, or expend for their benefit, the sum of sixty-five thousand dollars per annum, for ten years, commencing with the year in which they shall remove to, and settle and reside upon, their said reservation – forty thousand dollars per annum for and during ten years thereafter – twenty-five thousand dollars per annum for and during ten years thereafter – and fifteen thousand dollars per annum for and during twenty years thereafter; making one million and six hundred thousand dollars in annuities in the period of fifty years, of which sums the President of the United States shall, from time to time, determine what proportion shall be paid to said Indians, in cash, and what proportion shall be expended for their benefit, and, also, in what manner and for what objects such expenditure shall be made, due regard being had in making such determination to the best interests of said Indians. He shall likewise exercise the power to make such provision out of said sums as he may deem to be necessary and proper for the support and comfort of the aged or infirm, and helpless orphans of the said Indians. In case of any material decrease of said Indians, in number, the said amounts may, in the discretion of the



President of the United States, be diminished and reduced in proportion thereto – or they may, at the discretion of the President of the United States, be discontinued entirely, should said Indians fail to make reasonable and satisfactory efforts to advance and improve their condition, in which case, such other provisions shall be made for them as the President and Congress may judge to be suitable and proper.

3d. In addition to the foregoing sum of one million and six hundred thousand dollars as annuities, to be paid to or expended for the benefit of said Indians, during the period of fifty years, as before stated, the United States hereby stipulate and agree to expend for their benefit the sum of fifty thousand dollars more, as follows, to wit: Twenty-five thousand dollars in maintaining and subsisting the said Indians during the first year after their removal to and permanent settlement upon their said reservation; in the purchase of stock, agricultural implements, or other articles of a beneficial character, and in breaking up and fencing land; in the erection of houses, storehouses, or other needful buildings, or in making such other improvements as may be necessary for their comfort and welfare.

4th. To expend ten thousand dollars to build a school-house or school-houses, and to establish and maintain one or more normal-labor schools (so far as said sum will go) for the education and training of the children of said Indians in letters, agriculture, the mechanic arts, and housewifery, which school or schools shall be managed and conducted in such manner as the Secretary of the Interior shall direct. The said Indians hereby stipulating to keep constantly thereat, during at least nine

months in the year, all their children between the ages of seven and eighteen years; and if any of the parents, or others having the care of children, shall refuse or neglect to send them to school, such parts of their annuities as the Secretary of the Interior may direct, shall be withheld from them and applied as he may deem just and proper; and such further sum, in addition to the said ten thousand dollars, as shall be deemed necessary and proper by the President of the United States, shall be reserved and taken from their said annuities, and applied annually, during the pleasure of the President to the support of said schools, and to furnish said Indians with assistance and aid and instruction in agricultural and mechanical pursuits, including the working of the mills, hereafter mentioned, as the Secretary of the Interior may consider necessary and advantageous for said Indians; and all instruction in reading shall be in the English language. And the said Indians hereby stipulate to furnish, from amongst themselves, the number of young men that may be required as apprentices and assistants in the mills and mechanic shops, and at least three persons to work constantly with each white laborer employed for them in agriculture and mechanical pursuits, it being understood that such white laborers and assistants as may be so employed are thus employed more for the instruction of the said Indians than merely to work for their benefit; and that the laborers so to be furnished by the Indians may be allowed a fair and just compensation for their services, to be fixed by the Secretary of the Interior, and to be paid out of the shares of annuity of such Indians as are able to work, but refuse or neglect to do so. And whenever the President of the United States shall become



satisfied of a failure, on the part of said Indians, to fulfil the aforesaid stipulations, he may, at his discretion, discontinue the allowance and expenditure of the sums so provided and set apart for said school or schools, and assistance and instruction.

5th. To provide the said Indians with a mill suitable for grinding grain and sawing timber; one or more mechanic shops, with the necessary tools for the same; and dwelling-houses for an interpreter, miller, engineer for the mill, (if one be necessary,) a farmer, and the mechanics that may be employed for their benefit, and to expend therefor a sum not exceeding fifteen thousand dollars.

ARTICLE 5.

Said Indians further stipulate and bind themselves to prevent any of the members of their tribe from destroying or injuring the said houses, shops, mills, machinery, stock, farming-utensils, or any other thing furnished them by the Government, and in case of any such destruction or injury of any of the things so furnished, or their being carried off by any member or members of their tribe, the value of the same shall be deducted from their general annuity; and whenever the Secretary of the Interior shall be satisfied that said Indians hae become sufficiently confirmed in habits of industry and advanced in the acquisition of a practical knowledge of agriculture and the mechanic arts to provide for themselves, he may, at his discretion, cause to be turned over to them all of the said houses and other property furnished them by the United States, and dispense with the services of any or all

persons hereinbefore stipulated to be employed for their benefit, assistance, and instruction.

ARTICLE 6.

It is hereby agreed and understood that the chiefs and headmen of said tribe may, at their discretion, in open council, authorize to be paid out of their said annuities such a sum or sums as may be found to be necessary and proper, not exceeding in the aggregate one hundred and fifty thousand dollars, to satisfy their just debts and obligations, and to provide for such of their half-breed relations as do not live with them, or draw any part of the said annuities of said Indians: Provided, however, That their said determinations shall be approved by their agent for the time being, and the said payments authorized by the Secretary of the Interior: Provided, also, That there shall not be so paid out of their said annuities in any one year, a sum exceeding fifteen thousand dollars.

ARTICLE 7.

On account of their valuable services and liberality to the Yanctons, there shall be granted in fee to Charles F. Picotte and Zephyr Rencontre, each, one section of six hundred and forty acres of land, and to Paul Dorian one-half a section; and to the half-breed Yancton, wife of Charles Reulo, and her two sisters, the wives of Eli Bedaud and Augustus Traverse, and to Louis Le Count, each, one-half a section. The said grants shall be selected in said ceded territory, and shall not be within said reservation, nor shall they interfere in any way with the improvements of such persons as are on the lands ceded



above by authority of law; and all other persons (other than Indians, or mixed-bloods) who are now residing within said ceded country, by authority of law, shall have the privilege of entering one hundred and sixty acres thereof, to include each of their residences or improvements, at the rate of one dollar and twenty-five cents per acre.

ARTICLE 8.

The said Yancton Indians shall be secured in the free and unrestricted use of the red pipe-stone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire.

ARTICLE 9.

The United States shall have the right to establish and maintain such military posts, roads, and Indian agencies as may be deemed necessary within the tract of country herein reserved for the use of the Yanctons; but no greater quantity of land or timber shall be used for said purposes than shall be actually requisite; and if, in the establishment or maintenance of such posts, roads, and agencies, the property of any Yancton shall be taken, injured, or destroyed, just and adequate compensation shall be made therefor by the United States.

ARTICLE 10.

No white person, unless in the employment of the United States, or duly licensed to trade with the Yanctons, or members of the families of such persons, shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians, nor shall said Indians alienate, sell, or in any manner dispose of any portion thereof, except to the United States. Whenever the Secretary of the Interior shall direct, said tract shall be surveyed and divided as he shall think proper among said Indians, so as to give to each head of a family or single person a separate farm, with such rights of possession or transfer to any other member of the tribe or of descent to their heirs and representatives as he may deem just.

ARTICLE 11.

The Yanctons acknowledge their dependence upon the Government of the United States, and do hereby pledge and bind themselves to preserve friendly relations with the citizens thereof, and to commit no injuries or depredations on their persons or property, nor on those of members of any other tribe or nation of Indians; and in case of any such injuries or depredations by said Yanctons, full compensation shall, as far as possible, be made therefor out of their tribal annuities, the amount in all cases to be determined by the Secretary of the Interior. They further pledge themselves not to engage in hostilities with any other tribe or nation, unless in self-defence, but to submit, through their agent, all matters of dispute and difficulty between themselves and other Indians for



the decision of the President of the United States, and to acquiesce in and abide thereby. They also agree to deliver, to the proper officer of the United States all offenders against the treaties, laws, or regulations of the United States, and to assist in discovering, pursuing, and capturing all such offenders, who may be within the limits of their reservation, whenever required to do so by such officer.

ARTICLE 12.

To aid in preventing the evils of intemperance, it is hereby stipulated that if any of the Yanctons shall drink, or procure for others, intoxicating liquor, their proportion of the tribal annuities shall be withheld from them for at least one year; and for a violation of any of the stipulations of this agreement on the part of the Yanctons they shall be liable to have their annuities withheld, in whole or in part, and for such length of time as the President of the United States shall direct.

ARTICLE 13.

No part of the annuities of the Yanctons shall be taken to pay any debts, claims, or demands against them, except such existing claims and demands as have been herein provided for, and except such as may arise under this agreement, or under the trade and intercourse laws of the United States.

ARTICLE 14.

The said Yanctons do hereby fully acquit and release the United States from all demands against them on the

part of said tribe, or any individual thereof, except the beforementioned right of the Yanctons to receive an annuity under said treaty of Laramie, and except, also, such as are herein stipulated and provided for.

ARTICLE 15.

For the special benefit of the Yanctons, parties to this agreement, the United States agree to appoint an agent for them, who shall reside on their said reservation, and shall have set apart for his sole use and occupation, at such a point as the Secretary of the Interior may direct, one hundred and sixty acres of land.

ARTICLE 16.

All the expenses of the making of this agreement, and of surveying the said Yancton reservation, and of surveying and marking said pipe-stone quarry, shall be paid by the United States.

ARTICLE 17.

This instrument shall take effect and be obligatory upon the contracting parties whenever ratified by the Senate and the President of the United States.

Source: April 19, 1858, 11 Stat 743;
Ratified February 16, 1859;
Proclamation February 26, 1859.

---



## AGREEMENT WITH THE YANKTON SIOUX OR DAKOTA INDIANS, IN SOUTH DAKOTA

Sec. 12. The following agreement, made by J.C. Adams and John J. Cole, commissioners on the part of the United States, with the chiefs, headmen, and other male adults of the Yankton tribe of Sioux or Dakota Indians upon the Yankton Reservation, in the State of South Dakota, on the thirty-first day of December, eighteen hundred and ninety-two, and now on file in the Department of the Interior, and signed by said commissioners on behalf of the United States, and by Charles Martin, Edgar Lee, Charles Jones, Isaac Hepikigan, Stephen Cloud Elk, Edward Yellow Bird, Iron Lingthing, Eli Brockway, Alex Brunot, Francis Willard, Louis Shunk, Joseph Caje, Albion Hitika, John Selwyn, Charles Ree, Joseph Cook, Brigham Young, William Highrock, Frank Felix, and Philip Ree, on behalf of the said Yankton tribe of Sioux Indians, is hereby accepted, ratified, and confirmed.

ARTICLES OF AGREEMENT

Whereas J.C. Adams and John J. Cole, duly appointed commissioners on the part of the United States, did, on the thirty-first day of December, eighteen hundred and ninety-two, conclude an agreement with the chiefs, headmen, and other male adults of the Yankton tribe of Sioux or Dacotah Indians upon the Yankton Reservation, in the State of South Dakota, which said agreement is as follows:

Whereas a clause in the act making appropriations for the current and contingent expenses of the Indian

Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth (30th), eighteen hundred and ninety-three (1893), and for other purposes, approved July 13th, 1892, authorizes the "Secretary of the Interior to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress;" and

Whereas the Yankton tribe of Dacotah – now spelled Dakota and so spelled in this agreement – or Sioux Indians is willing to dispose of a portion of the land set apart and reserved to said tribe, by the first article of the treaty of April (19th) nineteenth, eighteen hundred and fifty-eight (1858), between said tribe and the United States, and situated in the State of South Dakota:

Now, therefore, this agreement made and entered into in pursuance of the provisions of the act of Congress approved July thirteenth (13th), eighteen hundred and ninety-two (1892), at the Yankton Indian Agency, South Dakota, by J.C. Adams of Webster, S.D., John J. Cole of St. Louis, Mo., and I.W. French of the State of Neb., on the part of the United States, duly authorized and empowered thereto, and the chiefs, headmen, and other male adult members of said Yankton tribe of Indians, witnesseth:

ARTICLE I.

The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the



unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.

ARTICLE II.

In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000), as hereinbefore provided for.

ARTICLE III.

Section 1. Sixty days after the ratification of this agreement by Congress, or at the time of the first interest payment, the United States shall pay to the said Yankton tribe of Sioux Indians, in lawful money of the United States, out of the principal sum stipulated in Article II, the sum of one hundred thousand dollars ($100,000), to be divided among the members of the tribe per capita. No interest shall be paid by the United States on this one hundred thousand dollars ($100,000).

Section 2. The remainder of the purchase money or principal sum stipulated in Article II, amounting to five hundred thousand dollars ($500,000), shall constitute a fund for the benefit of the said tribe, which shall be placed in the Treasury of the United States to the credit of the said Yankton tribe of Sioux Indians, upon which the United States shall pay interest at the rate of five per centum (5) per annum from January first, eighteen hundred and ninety-three (January 1st, 1893), the interest to be paid and used as hereinafter provided for.

ARTICLE IV.

The fund of five hundred thousand dollars ($500,000) of the principal sum, placed to the credit of the Yankton tribe of Sioux Indians, as provided for in Article III, shall be payable at the pleasure of the United States after twenty-five years, in lawful money of the United States. But during the trust period of twenty-five years, if the necessities of the Indians shall require it, the United States may pay such part of the principal sum as the Secretary of the Interior may recommend, not exceeding $20,000 in any one year. At the payment of such sum it shall be deducted from the principal sum in the Treasury, and the United States shall thereafter pay interest on the remainder.

ARTICLE V.

Section 1. Out of the interest due to the Yankton tribe of Sioux Indians by the stipulations of Article III, the United States may set aside and use for the benefit of the tribe, in such manner as the Secretary of the Interior shall determine, as follows: For the care and maintenance of such orphans, and aged, infirm, or other helpless persons of the Yankton tribe of Sioux Indians, as may be unable to take care of themselves; for schools and educational purposes for the said tribe; and for courts of justice and other local institutions for the benefit of said tribe, such sum of money annually as may be necessary for these purposes, with the help of Congress herein stipulated, which sum shall not exceed six thousand dollars ($6,000) in any one year: Provided, That Congress shall appropriate, for the same purposes, and during the same time, out of any



money not belonging to the Yankton Indians, an amount equal to or greater than the sum set aside from the interest due to the Indians as above provided for.

Section 2. When the Yankton tribe of Sioux Indians shall have received from the United States a complete title to their allotted lands, and shall have assumed all the duties and responsibilities of citizenship, so that the fund provided for in section 1 of this article is no longer needed for the purposes therein named, any balance on hand shall be disposed of for the benefit of the tribe as the Secretary of the Interior shall determine.

ARTICLE VI.

After disposing of the sum provided for in Article V, the remainder of the interest due on the purchase money as stipulated in Article III shall be paid to the Yankton tribe of Sioux Indians semiannually, one-half on the thirtieth day of June and one-half on the thirty-first day of December of each year, in lawful money of the United States, and divided among them per capita. The first interest payment being made on June 30th, 1893, if this agreement shall have been ratified.

ARTICLE VII.

In addition to the stipulations in the preceding articles, upon the ratification of this agreement by Congress, the United States shall pay to the Yankton tribe of Sioux Indians as follows: To each person whose name is signed to this agreement and to each other male member of the tribe who is eighteen years old or older at the date of this

agreement, twenty dollars ($20) in one double eagle, struck in the year 1892 as a memorial of this agreement. If coins of the date named are not in the Treasury coins of another date may be substituted therefor. The payment provided for in this article shall not apply upon the principle sum stipulated in Article II, nor upon the interest thereon stipulated in Article III, but shall be in addition thereto.

ARTICLE VIII.

Such part of the surplus lands hereby ceded and sold to the United States as may now be occupied by the United States for agency, schools, and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes. But all other lands included in this sale shall, immediately after the ratification of this agreement by Congress, be offered for sale through the proper land office, to be disposed of under the existing land laws of the United States, to actual and bona fide settlers only.

ARTICLE IX.

During the trust period of twenty-five years, such part of the lands which have been allotted to members of the Yankton tribe of Indians in severalty, as the owner thereof can not cultivate or otherwise use advantageously, may be leased for one or more years at a time. But such leasing shall be subject to the approval of the Yankton Indian agent by and with the consent of the Commissioner of Indian Affairs; and provided that such leasing shall not in any case interfere with the cultivation



of the allotted lands by the owner thereof to the full extent of the ability of such owner to improve and cultivate his holdings. The intent of this provision is to compel every owner of allotted lands to cultivate the same to the full extent of his ability to do so, before he shall have the privilege of leasing any part thereof, and then he shall have the right to lease only such surplus of his holdings as he is wholly unable to cultivate or use advantageously. This provision shall apply alike to both sexes, and to all ages, parents acting for their children who are under their control, and the Yankton Indian agent acting for minor orphans who have no guardians.

ARTICLE X.

Any religious society, or other organization now occupying under proper authority for religious or educational work among the Indians any of the land under this agreement ceded to the United States, shall have the right for two years from the date of the ratification of this agreement within which to purchase the land so occupied at a valuation fixed by the Secretary of the Interior, which shall not be less than the average price paid to the Indians for these surplus lands.

ARTICLE XI.

If any member of the Yankton tribe of Sioux Indians shall within twenty-five years die without heirs, his or her property, real and personal, including allotted lands, shall be sold under the direction of the Secretary of the Interior, and the proceeds thereof shall be added to the

fund provided for in Article V for schools and other purposes.

ARTICLE XII.

No part of the principal or interest stipulated to be paid to the Yankton tribe of Sioux Indians, under the provisions of this agreement, shall be subject to the payment of debts, claims, judgments, or demands against said Indians for damages or depredations claimed to have been committed prior to the signing of this agreement.

ARTICLE XIII.

All persons who have been allotted lands on the reservation described in this agreement and who are now recognized as members of the Yankton tribe of Sioux Indians, including mixed-bloods, whether their white blood comes from the paternal or maternal side, and the children born to them, shall enjoy the undisturbed and peaceable possession of their allotted lands, and shall be entitled to all the rights and privileges of the tribe enjoyed by full-blood Indians.

ARTICLE XIV.

All allotments of lands in severalty to members of the Yankton tribe of Sioux Indians, not yet confirmed by the Government, shall be confirmed as speedily as possible, correcting any errors in same, and Congress shall never pass any act alienating any part of these allotted lands from the Indians.



ARTICLE XV.

The claim of fifty-one Yankton Sioux Indians, who were employed as scouts by General Alf. Sully in 1864, for additional compensation at the rate of two hundred and twenty-five dollars ($225) each, aggregating the sum of eleven thousand four hundred and seventy-five dollars ($11,475) is hereby recognized as just, and within ninety days (90) after the ratification of this agreement by Congress the same shall be paid in lawful money of the United States to the said scouts or to their heirs.

ARTICLE XVI.

If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians, under the treaty of April 19th, 1858, including the fee to the land as well as the right to work the quarries, the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States, to be decided by that tribunal. And the United States shall furnish, without cost to the Yankton Indians, at least one competent attorney to represent the interests of the tribe before the court.

If the Secretary of the Interior shall not, within one year after the ratification of this agreement by Congress, refer the question of the ownership of the said Pipestone Reservation to the Supreme Court, as provided for above, such failure upon his part shall be construed as, and shall be, a waiver by the United States of all rights to the ownership of the said Pipestone Reservation, and the

same shall thereafter be solely the property of the Yankton tribe of the Sioux Indians, including the fee to the land.

ARTICLE XVII.

No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

ARTICLE XVIII.

Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

ARTICLE XIX.

When this agreement shall have been ratified by Congress, an official copy of the act of ratification shall be



engrossed, in copying ink, on paper of the size this agreement is written upon, and sent to the Yankton Indian agent to be copied by letter press in the "Agreement Book" of the Yankton Indians.

ARTICLE XX.

For the purpose of this agreement, all young men of the Yankton tribe of Sioux Indians, eighteen years of age or older, shall be considered adults, and this agreement, when signed by a majority of the male adult members of the said tribe, shall be binding upon the Yankton tribe of Sioux Indians. It shall not, however, be binding upon the United States until ratified by the Congress of the United States, but shall as soon as so ratified become fully operative from its date. A refusal by Congress to ratify this agreement shall release the said Yankton Indians under it.

In witness whereof, the said J.C. Adams, John J. Cole, and J.W. French, on the part of the United States, and the chiefs, headmen, and other adult male Indians, on the part of the said Yankton tribe of Sioux or Dakota – spelled also Dacotah – Indians, have hereunto set their hands and affixed their seals.

Done at the Yankton Indian agency, Greenwood, South Dakota, this thirty-first day of December, eighteen hundred and ninety-two (Dec. 31st, 1892).

JAMES C. ADAMS, [SEAL.]
JOHN J. COLE, [SEAL.]

The foregoing articles of agreement having been read in open council, and fully explained to us, we, the undersigned, chiefs, headmen, and other adult male members

of the Yankton tribe of Sioux Indians, do hereby consent and agree to all the stipulations therein contained.

Witness our hands and seals of date as above.

Wicahaokdeun (William T. Selwyn), seal; and others:

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same hereby is, accepted, ratified, and confirmed.

That for the purpose of carrying the provisions of this Act into effect there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of six hundred thousand dollars, or so much thereof as may be necessary, of which amount the sum of five hundred thousand dollars shall be placed to the credit of said tribe in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum from the first day of January, eighteen hundred and ninety-three, said interest to be paid and distributed to said tribe as provided in articles five and six of said agreement. Of the amount herein appropriated one hundred thousand dollars shall be immediately available to be paid to said tribe, as provided in section one of article three of said agreement. There is also hereby appropriated the further sum of ten thousand dollars, or so much thereof as may be necessary, which sum shall be immediately available, to be paid to the adult male members of said tribe, as provided in article seven of said agreement. There is also hereby appropriated the further sum of



eleven thousand four hundred and seventy-five dollars, which sum shall be immediately available, to be paid as provided in article fifteen of said agreement: Provided, That none of the money to be paid to said Indians under the terms of said agreement, nor any of the interest thereon, shall be subject to the payment of any claims, judgments, or demands against said Indians for damages or depredations claimed to have been committed prior to the signing of said agreement.

That the lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota: Provided, That each settler on said lands shall, in addition to the fees provided by law, pay to the United States for the land so taken by him the sum of three dollars and seventy-five cents per acre, of which sum he shall pay fifty cents at the time of making his original entry and the balance before making final proof and receiving a certificate of final entry; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.

That the Secretary of Interior, upon proper plats and description being furnished, is hereby authorized to issue patents to Charles Picotte and Felix Brunot, and W.T.

Selwyn, United States interpreters, for not to exceed one acre of land each, so as to embrace their houses near the agency buildings upon said reservation, but not to embrace any buildings owned by the Government, upon the payment by each of said persons of the sum of three dollars and seventy-five cents.

That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars.

Source: 28 Stat 286.

---



IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * *

STATE OF SOUTH DAKOTA, Plaintiff and Appellee,

v.

FRED GREGER, Defendant and Appellant.

* * *

APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
CHARLES MIX COUNTY, SOUTH DAKOTA

* * *

THE HONORABLE RICHARD BOGUE
Judge

* * *

MARK W. BARNETT
Attorney General

JOHN P. GUHIN
ROXANNE GIEDD
SHERRI SUNDEM WALD
Assistant Attorneys General
Pierre, South Dakota — Attorneys for plaintiff and appellee.

THOMAS J. DEADRICK
Platte, South Dakota — Attorney for defendant and appellant.

TIMOTHY R. WHALEN
Charles Mix County State's Attorney
Lake Andes, South Dakota

TOM D. TOBIN of
Tobin Law Offices
Winner, South Dakota

Attorneys for amicus curie [sic]
Charles Mix County.

* * *

ARGUED ON OCTOBER 24, 1996
OPINION FILED **02/19/97**

KONENKAMP, Justice.

***Preface***

[¶1.] In an Agreement with the United States dated December 31, 1892, the Yankton Sioux Tribe "ceded, sold, relinquished and conveyed" all its unallotted reservation land for a "sum certain" of $600,000. Under firmly established doctrine, these words of absolute conveyance create a "nearly insurmountable presumption" that the reservation was diminished. Nevertheless, will the original boundaries remain intact because the Agreement further stated "all provisions of the [earlier treaty establishing the reservation] shall be in full force and effect, the same as though this Agreement had not been made. . . . "? We conclude that giving this excerpt unqualified primacy would make the remainder of the Agreement meaningless, but interpreted in context with the whole document, relevant contemporary circumstances, and congressional purpose, diminishment was plainly intended.

***Historical Overview***

[¶2.] Beginning in the late eighteenth and continuing through the mid-nineteenth century, the United States endeavored to exchange Indian lands in the east for



regions further west. This "Indian removal" policy contemplated forging permanent tribal "homelands" in the western expanse. Various treaties created immense reservations designed to allow traditional ways of life to continue. Yet as immigration increased and pioneers advanced ever westward, settlers, railroaders, miners, and developers brought increasing pressure to further contain Indian tribes, calling for reservations to be opened for settlement and inevitably extinguished. Reformers hoping to improve the welfare of Indian people also sought to resolve the "Indian problem" through a plan of assimilation, encouraging Native Americans to become farmers and ranchers alongside homesteaders. Congress supervened with the Dawes Severalty Act (or General Allotment Act) of 1887, followed by a series of surplus land acts. With the allotment system, the homesteading ideal would be applied to "civilize" Indian people by forcing them onto individual plots cut out of reservations, while freeing unassigned lands for non-Indian settlement. Eventually, the allotment system was considered a failure. In 1934, the Indian Reorganization Act banned further allotments and restored remaining surplus lands to the tribes at the discretion of the Secretary of the Interior. Yet, this abandoned policy left perplexing jurisdictional problems, as Justice Thurgood Marshall chronicled in Solem v. Bartlett, 465 US 463, 467-69, 104 SCt 1161, 1164-65, 79 LEd2d 443, 448-49 (1984) (footnotes and internal citations omitted):

> The modern legacy of the surplus land Acts has been a spate of jurisdictional disputes between state and federal officials as to which sovereign has authority over lands that were opened by the Acts and have since passed out of

Indian ownership. As a doctrinal matter, the States have jurisdiction over unallotted opened lands if the applicable surplus land Act freed that land of its reservation status and thereby diminished the reservation boundaries. On the other hand, federal, state, and tribal authorities share jurisdiction over these lands if the relevant surplus land Act did not diminish the existing Indian reservation because the entire opened area is Indian country under 18 U.S.C. § 1151(a) (1982 ed.).

Unfortunately, the surplus land Acts themselves seldom detail whether opened lands retained reservation status or were divested of all Indian interests. When the surplus land Acts were passed, the distinction seemed unimportant. The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians. Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries. See Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. § 1151 (1982 ed.)).

Another reason why Congress did not concern itself with the effect of surplus land Acts on reservation boundaries was the turn-of-the-century assumption that Indian reservations were a thing of the past. Consistent with prevailing



wisdom, Members of Congress voting on the surplus land Acts believed to a man that within a short time – within a generation at most – the Indian tribes would enter traditional American society and the reservation system would cease to exist. Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation.

Although the Congresses that passed the surplus land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act. Rather, it is settled law that some surplus land Acts diminished reservations . . . and other surplus land Acts did not- . . . . The effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage.

### *The Yankton Reservation*

[¶3.] The 1858 Yankton Treaty of Cession created a 430,495-acre reservation along the eastern bank of the Missouri River for the Yankton Tribe. 11 Stat 743. Beginning in 1891, tracts within the reservation were allotted to individual Yankton Indians, leaving approximately 168,000 acres of unallotted land. The next year, in response to communications from the Tribe to the Secretary of the Interior, the United States appointed the Yankton Indian Commission to negotiate for the sale of the

surplus lands. A specific enactment was passed "to enable the Secretary of the Interior in his discretion to negotiate with any Indians for the surrender of portions of their respective reservations. . . . " 27 Stat 120, 136.

[¶4.] In their first meeting with the Commission, tribal members were urged to reflect on compelling realities:

> The buffalo is gone, the antelope is gone, you can no longer live by hunting. You must plow like the white man. You must raise cattle to take the place of the buffalo; you must raise sheep to take the place of the antelope. You must raise wheat and corn and oats to make bread and to feed your stock. You must raise everything which the white man raises and have plenty to eat and plenty to sell. Then you can build good houses where you can keep warm and dry and be comfortable. You can wear good warm clothes and have many comforts that will make you happy.

The Yanktons had suffered severe adversities over the years, as their ancestral ways of living dwindled away. John P. Williamson, a Presbyterian missionary who lived with the Yanktons for a quarter century, would later reflect in one of his annual reports:

> The Indian's occupation is gone, so far as the Yanktons are concerned. Twenty-five years ago they lived by the chase. Herds of buffalo numbering thousands ranged on the vast plains which were the hunting grounds of the Yanktons. From them they secured food, clothing and teepees, the three great objects of all industry. Now the white man has covered these vast plains with his wheat fields and herds of tame cattle, and the buffalo are no more. Never more



> suddenly has a ready people lost their entire means of support.

Commissioner John J. Cole explained to tribal members at one of the negotiation councils:

> The Great White Father . . . wants you to sell your surplus lands for which you have no use. If you want to sell these surplus lands we will buy them and pay you all they are worth, and the Government will sell them to men who will make homes on them and will build good houses and make good farms, and this will make your other lands – your homes – worth more than all your lands are now worth, and what you get from the Government for the surplus lands will be a clear gain to you.

During their meetings, both the Yanktons and the Commission members equated this proposed sale with the 1858 Treaty when the Yanktons renounced ownership of any other lands claimed in the past. After months of negotiation, a majority of the male tribal members and the Commission reached agreement.[1] The first two articles provided:

> Article I.
>
> The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within

---

[1] The Agreement had been "translated into the Dakota language for the use and consideration of the Yankton Sioux tribe." In accord with tradition, only males participated in this type of decision: 255 of the 458 eligible male members signed the Agreement.

the limits of the reservation set apart to said Indians as aforesaid.

Article II.

In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000), as hereinbefore provided for.

Congressional ratification was delayed due to allegations of impropriety in negotiations. In September 1893, the Commissioner of Indian Affairs sent a special United States Indian Inspector to the reservation who, after an investigation, concluded "no undue pressure was used or improper methods resorted to. . . . " Many Yankton leaders knew well the import of their Agreement and were anxious to conclude it. In a petition dated March 2, 1894, to the Senate Indian Affairs Committee, 109 Yankton chiefs, headmen and tribal members urged quick congressional action, stating in part:

> When we signed the treaty [1892 Agreement] we knew what we were doing for ourselves and for the Yankton tribe in general. We did sign it because we love and respect our families, for whom we expect a support could be made out of the sale of our surplus lands. We signed it because our old and infirm people and orphans are in the need of help and are just at the present time badly off in various ways. . . .
>
> By means of the treaty we want to encourage our churches and schools and have the people progress in enlightenment and civilization. We want the nation to take on new life by



> becoming good farmers and mechanics and professional men, and that they should all be good citizens of the United States. . . . We want the laws of the United States and the State that we live in to be recognized and observed. We do not think it is a proper thing to keep up the tribal relation – as the tribal relation on this reservation is an obstacle and hindrance to the advancement of civilization.[2]

Prospective settlers were also eager for the new land to become available. On February 15, 1894, the Yankton Press and Dakotan reported:

> The prospect for the early opening of the Yankton reservation is causing quite a stir at Armour. Inquiries are pouring in from all directions, and the minute the bill passes congress there will be a rush to be on the ground.

During congressional floor debates, Representative Pickler of South Dakota reminded his fellow legislators, "The proposition that is before the House today is very simple. We are needing more lands for settlement. By an act of Congress we provided for sending out a commission to

---

[2] This petition was attached to a report from Mr. Shoup of the Committee on Indian Affairs, which stated in part:

> One of the greatest hindrances to the progress of these people in the past has been their tribal mode of life and ownership of land in common, and the issue of food and clothing to them by the Government. . . . The occupation of the land released by them by actual settlers under the homestead law bringing them in close contact with the frugal, moral, and industrious people who will settle there will stimulate individual effort and make their progress much more rapid than heretofore.

treat with the Yankton Sioux Indians for their reservation. . . . " By due course, the bill ratifying the Agreement became law on August 15, 1894. President Grover Cleveland opened the reservation with the following proclamation:

> Whereas . . . certain articles of agreement were made and concluded at the Yankton Indian Agency . . . whereby the said Yankton tribe of Sioux or Dacotah Indians, for the consideration therein mentioned, ceded, sold, relinquished, and conveyed to the United States, all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation set apart to said tribe by the [1858 Treaty]. . . .

Thus, the unallotted lands were declared available for non-Indian settlement effective May 21, 1895. That same year, South Dakota took over civil and criminal jurisdiction in the region and has since continuously maintained it.[3] *Cf.* South Dakota Constitution, Art. XXVI, § 18, ¶ 2.

[¶5.] Based upon the 1894 Act, the reservation reduced in size from a 410 square mile (430,495 acre) sanctuary

---

[3] The Indian agent's report that year reflects some lingering questions over citizenship status:

> During the past year the unallotted lands of this reservation by Executive proclamation have been thrown open for settlement and thereby some complications as to a conflict of authority of the agent and the State authorities have arisen. . . . The elective franchise has not yet been extended to them by the State, nor have they been taxed; yet under the Dawes bill they are citizens, and as such are subject to the laws, both civil and criminal, of the State.



down to what is presently scattered Indian holdings of approximately 40,000 acres. Indians and non-Indians alike have since referred to the Yankton Reservation as a "mile square."[4]

### *Defendant's Offense*

[¶6.] Defendant, Fred Greger, is an enrolled member of the Yankton Sioux Tribe. On January 13, 1993, he and Ed Huerta were fighting in the Double D Bar in Wagner. When Huerta was escorted from the bar, defendant grabbed Huerta's wife, Lanae, and punched her in the face. The assault left her with a permanent facial scar, two missing teeth, and broken glasses. As a result, defendant was charged and convicted of aggravated assault. He raises two issues on appeal: (1) jurisdiction; and (2) violation of his Fifth Amendment privilege. Defendant believes the recent decision in Yankton Sioux Tribe v. Southern Missouri Waste Management District, 890 FSupp 878 (DSD 1995), *aff'd* 99 F3d 1439 (8thCir 1996), controls the jurisdictional issue in his case.[5] If the 1858

---

[4] This refers to the tribal headquarters area at Marty. *See, e.g.*, 1932 tribal member petition. (Exhibit # 32). *See also* Superintendent's remarks concerning "mile square" area. (Exhibit # 632).

[5] By stipulation, the parties incorporated the record from *Southern Missouri*. Hence, we have thoroughly reviewed its proceedings as well as the record in this case. We do not consider ourselves bound, however, by the Eighth Circuit's decision, for as the United States Supreme Court held in Asarco, Inc. v. Kadish, 490 US 605, 617, 109 SCt 2037, 2045, 104 LEd2d 696, 715 (1989):

> state courts . . . possess the authority, absent a provision for exclusive federal jurisdiction, to render

boundaries are still in existence, they would encompass Wagner.

*Discussion*

[¶7.] ***I. Prior Decisions on the Status of the Yankton Reservation***

[¶8.] In Perrin v. United States, 232 US 478, 34 SCt 387, 58 LEd 691 (1914), the Supreme Court designated the area now in question as "ceded lands formerly included in the Yankton Sioux Indian Reservation" when construing Article XVII, the section prohibiting liquor sales on ceded lands in the 1892 Agreement. *Id.* at 480, 34 SCt at 388, 58 LEd at 693. Referring to the "original reservation" as constituting 400,000 acres, the Court concluded federal jurisdiction existed beyond Indian country to enforce the alcohol prohibition, reasoning that "[i]f liquor is injurious to [Native Americans] inside a reservation, it is equally so outside of it. . . . " *Id.* at 484, 34 SCt at 390, 58 LEd at 695 (quoting United States v. Forty-three Gallons of Whiskey, 93 US 188, 195, 23 LEd 846, 848 (1876)).

---

> binding judicial decisions that rest on their own interpretations of federal law. (Citations omitted). Indeed, inferior federal courts are not required to exist under Article III, and the Supremacy Clause explicitly states that "the Judges in every State shall be bound" by federal law. U.S. Const., Art. VI, cl. 2.

Surely, it is "within their power and their proper role [for state courts] to render binding judgments on issues of federal law, subject to review by this Court." *Asarco*, 490 US at 620, 109 SCt at 2047, 104 LEd2d at 717. *But see* St. Cloud v. Leapley, 521 NW2d 118, 122 (SD 1994) (for purposes of federal criminal jurisdiction, we are bound by federal court interpretation of federal statute).



> The chiefs doubtless saw, from the curtailment of their reservation, and the consequent restriction of the limits of the "Indian country," that ceded lands would be used to store liquors for sale to the young men of the tribe; and they well knew that, *if there was no cession, they were already sufficiently protected by the extent of their reservation.*

*Id.* (emphasis added). This holding clearly depends for its import on the diminishment of reservation boundaries. Otherwise, there would have been no need for any legal inquiry to rationalize expanding federal jurisdiction into non-Indian regions. Of course, *Perrin's* notion of Indian country was consistent with the view at the time that reservations included "only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians." *Solem*, 465 US at 468, 104 SCt at 1165, 79 LEd2d at 448. Nevertheless, since *Perrin*, the Supreme Court has continued to regard the reservation as diminished. *See* Johnson v. Geralds, 234 US 422, 444-45, 34 SCt 794, 802, 58 LEd 1383, 1392 (1914) (referring to "ceded lands formerly included in the Yankton Sioux Indian Reservation in the State of South Dakota"); United States v. Mazurie, 419 US 544, 554, 95 SCt 710, 716, 42 LEd2d 706, 715 (1975) ("land [which] originally had been included in the Yankton Sioux Indian Reservation, but had been ceded to the United States").

[¶9.] Lower federal courts have also recognized boundary diminishment. *See, e.g.*, Cihak v. United States, 232 F 551, 551 (8thCir 1916); Forman v. United States, 256 F2d 766, 767 (8thCir 1958); Weddell v. Meierhenry, 636 F2d

211, 213 n2 (8thCir 1980), *cert. denied*, 451 US 941, 101 SCt 2024, 68 LEd2d 329 (1981). *See also* the United States Court of Claims decision in Yankton Sioux Tribe v. United States, 623 F2d 159, 165 (CtCl 1980):

> These final boundaries of the Yankton Sioux Reservation were respected by [the tribe and the United States] for more than three decades up until the 1892 Agreement changed those boundaries by the cession at issue in this case.

[¶10.] In addition, four times our Court found the reservation was diminished or disestablished. Wood v. Jameson, 81 SD 12, 15, 130 NW2d 95, 97 (1964) (the "operative language" of the 1892 Agreement provided that the "Yankton tribe for an agreed consideration did 'cede, sell, relinquish, and convey to the United States all their claim, right, title and interest . . . ' "). Citing *Perrin*, the *Wood* Court wrote "Construing the Indian treaty and the 1894 ratifying Act together we think it was the purpose of Congress to disestablish the reservation. . . . " *Id.* at 19, 130 NW2d at 99. In State v. Williamson, 87 SD 512, 515, 211 NW2d 182, 184 (1973), we held "the Act of 1894 disestablished that portion of the Yankton Reservation which was ceded and sold to the United States. . . . " Justices Wollman and Biegelmeier concurred and reflected that the 1894 Act "expresses a congressional determination to terminate the reservation status of the portion of the reservation ceded, sold, relinquished and conveyed to the United States by the Yankton Tribe." *See also* State v. Winckler, 260 NW2d 356, 360 (SD 1977) (noting, "the Yankton Indian Reservation was disestablished"). Again in State v. Thompson, 355 NW2d 349 (SD 1984), we adjudged that the two most critical factors in



the 1894 Act, the "cession" and "sum certain" language, compelled a finding of diminishment.

[¶11.] Diminishment of the Yankton Reservation has been challenged repeatedly; each time courts have answered with the same result, excepting only the most recent decision in *Southern Missouri*. Yet the matter appears resolved by the long series of decisions preceding it. Although the question of reservation diminishment is ultimately a matter of federal law, based upon this Court's analysis using standards established by the United States Supreme Court, we must regard the issue as settled. Nonetheless, to incorporate and comply with the Supreme Court's most recent holding in Hagen v. Utah, 510 US 399, 114 SCt 958, 127 LEd2d 252 (1994), we reevaluate the matter under its analysis.

[¶12.] ***II. Hagen Analysis***

[¶13.] In *Hagen*, the Court retained its traditional approach to diminishment questions, which requires an examination of all the circumstances surrounding a reservation opening. *Id.* at 410-11, 114 SCt at 965, 127 LEd2d at 265. By looking to precedent which "established a fairly clean analytical structure," the Court concluded the Uintah Indian Reservation was diminished by Congress when it opened the reservation to non-Indian settlers. *Id.* (citing *Solem*, 465 US at 470, 104 SCt at 1166, 79 LEd2d at 450). *Hagen* sets forth three factors for consideration:

> The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands. *Ibid.* [citing *Solem*, 465 US at 470, 104 SCt at 1166, 79 LEd2d at 450]. We have also considered the historical context surrounding the passage of the surplus land Acts,

although we have been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage. *Id.* at 471[, 104 SCt at 1166-67, 79 LEd2d at 451]. Finally, "[o]n a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation." *Ibid.* Throughout the inquiry, we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment. *Id.* at 470, 472[, 104 SCt at 1166, 1167, 79 LEd2d at 450, 451]; see also South Dakota v. Bourland, 508 US 679, 687, [113 SCt 2309, 2316, 124 LEd2d 606, 618] (1993) ("'[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" (quoting County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 US 251, 269, [112 SCt 683, 693, 116 LEd2d 687, 704] (1992) (internal quotation marks omitted))).

*Hagen*, 510 US at 411, 114 SCt at 965, 127 LEd2d at 265.[6] We examine each factor.

---

[6] While it is true that ambiguities are construed in favor of Indians, we are aware of the warning of the Supreme Court in Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe, 473 US 753, 774, 105 SCt 3420, 3432, 87 LEd2d 542, 558 (1985): "[C]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, 443 US [658, 675, 99 SCt 3055, 3069, 61 LEd2d 823, 839 (1979)], clearly runs counter to a tribe's later claims."



### *A. Statutory Language*

[¶14.] Congress incorporated the entire 1892 Agreement into its ratifying enactment. We begin here because "statutory language used to open the Indian lands" is the most "probative evidence of diminishment. . . . " *Id.* Yet, we would search in vain for words like "diminishment" or "disestablishment" as such expressions were not terms of art at the time. *Solem*, 465 US at 475 n17, 104 SCt at 1168 n17, 79 LEd2d at 453 n17. We must look, consequently, for other statutory language evincing "an express congressional purpose to diminish," *Solem*, 465 US at 475, 104 SCt at 1168-69, 79 LEd2d at 453, but no particular form of words is required. *Hagen*, 510 US at 411, 114 SCt at 965, 127 LEd2d at 265. To that end, we agree with the exhortation of the *Rosebud* Court, "as Mr. Justice (then Judge) Holmes commented, we are not free to say to Congress: 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.' " Rosebud Sioux Tribe v. Kneip, 430 US 584, 597, 97 SCt 1361, 1368, 51 LEd2d 660, 671 (quoting Johnson v. United States, 163 F 30, 32 (1stCir 1908)). Therefore, we analyze to determine whether there is "a statutory expression of congressional intent to diminish, [which,] coupled with the provision of a sum certain payment, would establish a nearly conclusive presumption that the reservation had been diminished." *Hagen*, 510 US at 411, 114 SCt at 965-66, 127 LEd2d at 265. *See also Solem*, 465 US at 470-71, 104 SCt at 1166, 79 LEd2d at 450 (noting that cession language, coupled with a commitment from Congress to compensate a tribe for land, created "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished").

[¶15.] The operative language of the 1894 Act provided that Yankton tribal members did "cede, sell, relinquish, and convey to the United States *all* their *claim, right, title,* and *interest* in and to *all* the unallotted lands within the limits of the reservation" and that in consideration for the "lands ceded, sold, relinquished, and conveyed" the United States agreed to pay a sum certain of $600,000. (Emphasis added). Nearly identical language signaled diminishment in DeCoteau v. District County Ct., where the Court noted that such language was "precisely suited" to diminishment. 420 US 425, 445, 95 SCt 1082, 1093, 43 LEd2d 300, 314 (1975). *Cf. Solem,* 463 US at 473, 104 SCt at 1167, 79 LEd2d at 452 (noting that "sell and dispose" language was not evidence of diminishment, while "cede, sell, relinquish and convey" constitutes such evidence).[7]

---

[7] *Compare* United States v. Grey Bear, 828 F2d 1286 (8thCir 1987), *vacated in part on other grounds on reh'g en banc,* 863 F2d 572 (8thCir 1988), *cert. denied,* 493 US 1047, 110 SCt 846, 107 LEd2d 840 (1990). In *Grey Bear,* the Eighth Circuit Court of Appeals considered an act that contained cession language similar to that of the 1892 Yankton Agreement. 828 F2d at 1290. However, it did not provide for a sum certain payment, so the court held that the "almost insurmountable presumption" of disestablishment was not present. The court noted:

> We agree with the district court's analysis that although the "cede, surrender, grant, and convey" language of the Act suggests congressional intent to disestablish the reservation boundaries, the Act does not contain an *unconditional* commitment by Congress to pay the tribe for the ceded lands. Compensation for the lands was not set at any fixed price and the tribe was guaranteed reimbursement only for the lands actually disposed of by the government.



[¶16.] Other passages bolster a finding of intent to diminish. In ratifying the 1892 Agreement, Congress added a provision requiring that "the sixteenth and thirty-sixth sections in each Congressional township . . . shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota." This language explicitly conforms to the enabling act granting statehood to South Dakota. The Act of February 22, 1889, admitting South Dakota to the Union (25 Stat 679 § 10) provided in part:

> [U]pon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States . . . are hereby granted to said States for the support of common schools . . . : Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants . . . of this act, nor shall any land embraced in Indian, military, or other reservation of any character be subject to the grants . . . of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

---

*Id.* (citations omitted). This differs from the 1892 Yankton Agreement, as that document not only contained the cession language, but also provided for a sum certain of $600,000 for the sold land. *But see Hagen,* 510 US at 412, 14 SCt at 966, 127 LEd2d at 265 ("While the provision for definite payment can certainly provide additional evidence of diminishment, the lack of such a provision does not lead to the contrary conclusion.").

From this same parallel statutory arrangement, the Court in *Rosebud* discerned

> a congressional intent to disestablish Gregory County from the Rosebud Reservation, thereby making the sections available for disposition to the State of South Dakota for "school sections" under § 10 of the Act of February 22, 1889.

430 US at 601, 97 SCt at 1370, 51 LEd2d at 673.[8] The Court noted, "Congress, therefore, [in using such language] clearly thought that it was acting pursuant to § 10 of the

---

[8] Article VIII in the 1892 Agreement states "[s]uch part of the ceded surplus lands hereby ceded and sold to the United States as may now be occupied by the United States for agency, schools, and other purposes . . . until they are no longer required for such purposes." The school lands provision in the Cheyenne River Act in *Solem*, 465 US at 474, 104 SCt at 1168, 79 LEd2d at 452-53, is somewhat similar, as the Secretary of the Interior could set aside land "for agency, school, and religious purposes, to remain reserved as long as needed, and as long as agency, school, or religious institutions are maintained thereon for the benefit of said Indians." *Id.* (citing 35 Stat 461). However, the difference between the Act in *Solem*, which was held to not have created diminishment, and the 1892 Yankton Agreement is that the Cheyenne River Act did not have the dispositive cession language which has been found to create diminishment in the past. *See, e.g., DeCoteau*, 420 US at 445-46, 95 SCt at 1093-94, 43 LEd2d at 314-15. The *Solem* Court wrote, "Nowhere else in the [Cheyenne River] Act is there specific reference to the cession of Indian interests in the opened lands. . . . " 465 US at 474, 104 SCt at 1168, 79 LEd2d at 452. This is not the case in the 1892 Agreement, as we have noted, *supra*, that Article I provided the tribe would "cede, sell, relinquish, and convey" their lands to the United States. In addition, the school lands provision refers to the "ceded surplus lands hereby ceded and sold." *See Article VIII supra*. Therefore, the *Solem* analysis regarding the school lands similar provision is inapplicable to this case.



Act of February 22, 1889, and not *sub silentio* adding an additional grant for school lands located within a continuing reservation." *Id.* at 600-01, 97 SCt at 1370, 51 LEd2d at 673.

[¶17.] President Cleveland's Proclamation mirrors the 1894 enactment using the same language so often interpreted as authoritative in signifying boundary diminishment: "the said Yankton tribe of Sioux or Dacotah Indians, for the consideration therein mentioned, *ceded, sold, relinquished, and conveyed* to the United States, *all their claim, right, title and interest in and to all* the unallotted lands within the limits of the reservation set apart to said tribe by the [1858 Treaty]. . . . " The Supreme Court has held that such language in a presidential proclamation is clear evidence of diminishment, as it is "an unambiguous, contemporaneous, statement, by the Nation's Chief Executive." *Rosebud*, 430 US at 602, 97 SCt at 1371, 51 LEd2d at 674 ("*the said Indian tribe ceded, conveyed, transferred, relinquished, and surrendered, forever and absolutely, without any reservation whatsoever . . . all their claim, title, and interest of every kind and character . . .* "); *see also Hagen*, 510 US at 420, 114 SCt at 970, 127 LEd2d at 270.

[¶18.] Article XVII, the anti-liquor provision, notably distinguishes between reservation and ceded land:

> No intoxicating liquors nor other intoxicants shall ever be sold or given away upon *any of the lands by this agreement ceded and sold to the United States*, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, as afterwards surveyed

> and set off to the said Indians. (Emphasis added).

This terminology presupposes the ceded lands would not be part of the reservation. *Cf. Rosebud*, 430 US at 613, 97 SCt at 1376, 51 LEd2d at 680-81. Moreover, in 1892, Congress enacted laws prohibiting alcohol sales on Indian reservations. Adding this clause to the Agreement was unnecessary unless the parties understood that the ceded lands would no longer be part of the reservation. Although the laws prohibiting alcohol on reservations were created only a short time before the negotiations began in 1892, and even if it can be said that the negotiators were unaware of the 1892 Act prohibiting liquor sales on reservations, if it means nothing else, clearly by this language tribal members understood that without this Agreement the Tribe would have no control over commerce in alcohol on ceded lands. Finally, if the negotiators did not have the new alcohol prohibition statutes in mind, we can deduce that Congress knew of them when it passed the Act ratifying the Agreement, which included the no intoxicant provisions. Miles Apex Marine Corp., 498 US 19, 32, 111 SCt 317, 325, 112 LEd2d 275, 291 (1990)("We assume that Congress is aware of existing law when it passes legislation.").

[¶19.] We come now to the crux of defendant's argument. He jettisons all previous judicial rulings on diminishment for having failed to consider Article XVIII in the 1892 Agreement.

> Article XVIII
>
> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.



Defendant believes that by expressing a clear intent to conserve all provisions of the 1858 Treaty, the article manifests a purpose to maintain the reservation's exterior boundaries as they were before the Agreement was ratified in 1894. A literal reading of this passage to the exclusion of the remainder, however, would force a conclusion even more extreme than simply reviving the 1858 boundaries: it would also impugn the entire sale. After all, the 1858 Treaty guaranteed to the Yankton Tribe "quiet and peaceful" possession of 430,495 acres. If Article XVIII is given overarching prominence, then no provision contrary to the 1858 Treaty can stand, and the 1892 Agreement along with the congressional enactment ratifying it are nullities.

[¶20.] An understanding of the contemporary negotiations for the land purchase furnishes insight on the reason for this provision and why its language was so absolute. Many tribal members were reluctant to sign the Agreement without solid reassurance they would not lose their annuities pledged in the 1858 Treaty. Professor Hoover[9] believes the reference to annuities was probably

---

[9] The only historian to offer an opinion on the question was Professor Herbert Hoover of the University of South Dakota,

included "because during negotiations tribal members were led to believe that their annuity benefits might have been suspended had not a majority in the tribe acceded to the terms of the 1894 Agreement." The addition of the annuity language in the last sentence in Article XVIII seems to confirm the existence of these fears. Other promised financial entitlements were also discussed. For example, during the Great Sioux War, the Yankton Tribe had remained loyal to the United States, with some of its members acting as scouts for the Army. "Good scout" pay had been promised.[10] Yet history deplorably confirms the United States had not always kept its promises to Indian people. As one Yankton tribal member, White Swan, put it: "the Great Father has deceived us in many payments."

---

who testified on behalf of the Tribe in *Southern Missouri*. His testimony was included in this case by stipulation. Professor Hoover adds insightful details on the creation of the Yankton Reservation and the events surrounding the 1894 Act. He holds no doubt about the Tribe's continued sovereignty over the land in question, believing there is no evidence to support a contrary conclusion. He concedes only that, not being a lawyer, he is unable to perform a legal or case analysis.

[10] In fact, in Article XV the claim of fifty-one scouts employed by General Sully in 1864 was recognized as just, thus the Agreement provided for the payment of additional compensation to them or their heirs. It apparently did not concern government negotiators to assert that this pay should be contingent upon the land sale. Yet as the Supreme Court noted in *DeCoteau*, despite what we now perceive as injustices, "we cannot remake history." 420 US at 449, 95 SCt at 1095, 43 LEd2d at 317. This is not to say that negotiators had dishonest intentions. As Colonel Adams, one of the Commissioners, stated: "We want . . . your surplus lands, but we want to get it honorably."



A conflicting perception appears in the government negotiators' commentary: "The Indians, partly through ignorance and partly through craft, presented a long list of claims and grievances. They claim they had not received their dues under the Treaty of 1858. . . . " Whatever the viewpoint, the record of negotiations is replete with Yankton concerns for obtaining unsatisfied monetary entitlements before selling their unallotted reservation land. Nevertheless, in the chronicles kept at the time, no mention is found respecting the preservation of reservation boundaries, keeping a tribal presence on ceded lands, or extending Indian dominion over white settlements, except with respect to the prohibition on the sale of liquor as discussed in *Perrin*. Was Article XVIII a rhetorical overstatement inserted to reassure tribal members of their monetary entitlements? We need not rely solely upon contemporary annals for an answer to such an imponderable. Long established legal principles put Article XVIII in its legitimate perspective.

[¶21.] Although "legal ambiguities are resolved to the benefit of the Indians . . . [a] canon of construction is not a license to disregard clear expressions of tribal and congressional intent." *DeCoteau*, 420 US at 447, 95 SCt at 1094, 43 LEd2d at 315; South Carolina v. Catawba Indian Tribe, 476 US 498, 506, 106 SCt 2039, 2044, 90 LEd2d 490, 498 (1986); Oregon Dept. of Fish and Wildlife v. Klamath Tribe, 473 US 753, 766-770, 105 SCt 3420, 3428-30, 87 LEd2d 542, 553-55 (1985). Here, the canons reinforce our analysis. An age-old precept of contract interpretation requires that agreements be interpreted as a whole to give meaning to all terms, but when provisions conflict so that all cannot be given full weight, the more specific clauses

are deemed to reflect the parties' intentions – a specific provision controls a general one. Bock v. Perkins, 139 US 628, 634, 11 SCt 677, 679, 35 LEd 314, 316 (1891)("The particular description [in the contract] must control the . . . general description. . . . "). *See also* Colautti v. Franklin, 439 US 379, 99 SCt 675, 58 LEd2d 596 (1979)(one clause should not be read to render another inoperative). A definite intent was clearly expressed in the "cession and sum certain language" found in the congressionally approved Yankton Agreement. Articles I and II explicitly set forth, as the Supreme Court noted in another case, "a broad and unequivocal conveyance of the Tribe's title to the land and a surrender of '*all* their claim, *right*, title and interest *in and to*' that portion of the reservation. (Citation omitted). The . . . Agreement thus was both a divestiture of the Tribe's ownership of the ceded lands and a diminution of the boundaries of the reservation within which the Tribe exercised its sovereignty." *Oregon Department of Fish and Wildlife*, 473 US at 768, 105 SCt at 3429, 87 LEd2d at 554 (emphasis in original)(dealing with nearly identical divestiture language). Article XVIII only generally asserts the preeminence of the 1858 Treaty and in no way disavows the purpose of divestiture in Articles I and II.

[¶22.] A similar savings clause in a reservation sale agreement was found not to have overridden the clear intent of the agreement to diminish boundaries. In the Agreement with the Crow Indians, one provision stated:

> That all existing provisions of the treaty of May seventh Anno Domini eighteen hundred and sixty-eight, and the agreement approved by act of Congress dated April eleventh, eighteen hundred and eighty-two, shall continue in force.



26 Stat 989, 1039-1040, § 31. Act of March 3, 1891, 1 Kappler 407, 432, 435, § "Fifteenth." The Supreme Court found, despite this clause, the 1891 Crow Tribe Agreement diminished the size of their reservation. Montana v. United States, 450 US 544, 548, 101 SCt 1245, 1249, 67 LEd2d 493, 499 (1981); "An Act Accepting and Ratifying Agreement for Sale of a Portion of the Crow Indians of Montana Reservation," Ch 74, 22 Stat 42 (1882). *See also* Rosebud v. Kneip, 521 F2d 87, 94 n21 (8thCir 1975), *aff'd*, 430 US 584, 97 SCt 1361, 51 LEd2d 660 (1977)(savings clause held not to prevent diminishment); Chippewa Indians of Minnesota v. United States, 301 US 358, 368-70, 57 SCt 826, 830-31, 81 LEd 1156, 1163-64 (1937); Shoshone Tribe v. United States, 299 US 476, 489, 57 SCt 244, 248, 81 LEd 360, 365 (1937); United States *ex rel.* Cook v. Parkinson, 525 F2d 120, 124 (8thCir 1975), *cert. denied*, 430 US 982, 97 SCt 1677, 52 LEd2d 376 (1976).

[¶23.] Construing Article XVIII in the sweeping manner defendant advocates ignores the remainder of the Act. Such a result would be an extravagant misuse of the canons of statutory construction to salve modern sensibilities, especially given that the language in Articles I and II is so "precisely suited" to diminishment. Courts should not presume Congress intended an "absurd result." Hughey v. JMS Dev. Corp., 78 F3d 1523, 1529 (11thCir 1996); *In re* Pacific-Atlantic Trading Co., 64 F3d 1292, 1303 (9thCir 1995). To give Article XVIII pointed emphasis allows it to negate the preceding seventeen articles, and that is a result contrary to the plain meaning of the rest of the Agreement.

### *B. Historical Context*

[¶24.] Contemporary historical records are not as compelling as the statutory inferences, but they still add impetus to a judgment of diminishment. Commissioner of Indian Affairs Browning reported after reaching agreement, the land would be "restored to the public domain. . . . " In 1896, two years after ratification, the Commissioner of Indian affairs wrote: "I have the honor to report that the lands in the *former* Yankton Indian Reservation . . . were opened to settlement and entry. . . . " (Emphasis added). The 1889 map created by the General Land Office of the Department of Interior shows the reservation as contemplated by the 1858 Treaty, but beginning in 1901, their maps eliminated both the Yankton and Lake Traverse (Sisseton) Reservations in conformance with their respective land sale agreements. Similarly, maps contained in the Annual Reports of the Commissioner of Indian Affairs after the 1894 ratification still show the Yankton Reservation in outline using the 1858 boundaries; but before the sale, these maps depicted the reservation in color, as were other nondiminished reservations. After the sale, the coloring was removed from the depiction of the Yankton Reservation. Likewise, Annual Reports of the Commissioner of Indian Affairs before the 1894 Act indicate the Reservation had 409.75 square miles. The 1896 and 1897 reports, however, show no acreage or square mileage amounts. *See* Russ v. Wilkins, 624 F2d 914, 923-24 (9thCir 1980); *DeCoteau*, *supra*. The Historical Atlas of South Dakota (1904) refers to the former Yankton Indian reservation.

[¶25.] Both sides further rely on events and perceptions occurring many years after the 1894 Act as evidence to



either prove or disprove diminishment. Later perceptions are of lesser value, as the Supreme Court has "been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage." *Hagen*, 510 US at 411, 114 SCt at 965, 127 LEd2d at 265. Most of the contemporary evidence, including maps, atlases, and the behavior of federal, state and tribal entities, all either explicitly or tacitly acknowledge diminishment. We think it noteworthy also that in the 1892 sale, the Tribe retained no land for itself as a seat of government from which to manage the domain defendant now claims to be under its jurisdiction. The Tribe's 1932 Constitution asserts no claim to the 1858 Treaty boundaries. Only in recent times has the Tribe attempted to assert some dominion in this region.

[¶26] The 1894 Congressional Record confers additional insight into the understanding of Congress. Representative McRae stated during debate concerning a series of reservation land purchases, including the Yankton Agreement, that the lands involved "will become part of the public domain under these agreements. . . . " 53 CongRec 6425 (1894). In like manner, Representative Herman said the lands would become "a part of our public domain." 53 CongRec 6426 (1894). By returning lands to the public domain, Congress manifests an intent to diminish. *See Hagen*, 510 US at 414, 114 SCt at 967, 127 LEd2d at 267 ("[W]e hold that restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status."); *DeCoteau*, 420 US at 440 & 446, 95 SCt at 1091 & 1094, 43 LEd2d at 311 & 315.

*Compare Solem*, 465 US at 475, 104 SCt at 1168, 79 LEd2d at 453 (noting that reference to the public domain in a statute was supportive of diminishment, but not dispositive); *but see Hagen*, 510 US at 413, 114 SCt at 966-67, 127 LEd2d at 266-67 (differentiating between the Act in *Solem*, which did not "restore" the lands to the public domain, and the Act in question, which did direct "all the unallotted lands within said reservation shall be restored to the public domain"). This was also the understanding of the Commissioner of Indian Affairs: the lands "will be restored to the public domain."[11]

[¶27.] The United States has not attempted to exercise criminal jurisdiction in the area. All criminal offenses on nontrust land (91% of the region) are handled in state courts. Since 1895, the year the reservation was opened, South Dakota courts have consistently maintained, without intervention by federal or tribal authorities, civil and criminal jurisdiction within the former reservation

---

[11] Even if we assume congressional or administrative history regarding diminishment is not clear, we note such a position carried little weight with the *Rosebud* Court:

> The material presented by the parties reveals no consistent, or even dominant, approach to the territory in question. In light of the clear assumption of jurisdiction over the past 70 years by the State of South Dakota of the territory now in dispute, and acquiescence by the Tribe and Federal Government, this sporadic, and often contradictory, history of congressional and administrative actions in other respects carries but little force.

*Rosebud*, 584 US at 605 n27, 97 SCt at 1372 n27, 51 LEd2d at 675 n27.



boundaries. "[T]he single most salient fact is the unquestioned actual assumption of state jurisdiction over the unallotted lands. . . . " *See Rosebud*, 430 US at 603, 97 SCt at 1371, 51 LEd2d at 675. *See also* United States v. Grey Bear, 828 F2d 1286, 1291 (8thCir 1987), *dismissing in part, reversing in part on other grounds; affirming joinder issue on reh'g en banc*, 863 F2d 572 (8thCir 1988), *cert. denied*, 493 US 1047, 110 SCt 846, 107 LEd2d 840 (1990)("Jurisdictional history of disputed lands is an important factor because it reveals the traditional understanding of the Act, which has created justifiable expectations that should not be upset by a strained reading of the Act.").

### *C. Result of Opening the Reservation*

[¶28.] Finally, the Supreme Court has recognized that, if congressional language and payment, as well as contemporary history, are inconclusive, the courts will look to "who actually moved onto opened reservation lands . . . [as] relevant to deciding whether a surplus land Act diminished a reservation." *Solem*, 465 US at 471, 104 SCt at 1166, 79 LEd2d at 451. "Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Id.* (citing *Rosebud*, 430 US at 588 n3 & 604-05, 97 SCt at 1364 n3 & 1372-73, 51 LEd2d at 665 n3 & 675-76; *DeCoteau*, 420 US at 428, 95 SCt at 1085, 43 LEd2d at 304-05).

[¶29] Once the Yankton Reservation was opened, non-Indian settlers quickly moved in.

> [T]he population of Charles Mix County increased by 103.4 percent between 1890 and 1900, and of the 8,498 persons residing in Charles Mix County in 1900, only 1,483 were Indian. By 1910, the Indian population in Charles Mix County had dropped to 1,345, and Indian land holdings had dropped dramatically by 1914. This evidence tends to show that the opened lands quickly lost their Indian character.

*Southern Missouri*, 890 FSupp at 887 (internal citations omitted). As Professor Hoover phrased it, the "Yanktons entered the 1890's with 430,405 [sic] acres. By the year 1930, they had divested themselves of ownership on 387,047 acres and retained only 43,358." Today, less than ten percent of the land within the 1858 Treaty boundaries is trust land. Over 600 miles of road in the area are maintained by county and township authorities. Only 22 miles are maintained by the Bureau of Indian Affairs. The state-chartered municipalities of Wagner, Lake Andes, Dante, Pickstown, Ravinia, and Marty all lie within the former boundaries. Non-Indians comprise over two-thirds of the population in the area.

[¶30] Our review of a current map depicting Charles Mix County showing trust lands and other Indian holdings illustrates how dispersed these tracts are in relation to the extensive territory held in fee.[12] Yet if we accept defendant's arguments, over 6000 citizens of Charles Mix County would presently find they have become residents

---

[12] Exhibit 906 dated October 25, 1995, shows allotments, tribal trust lands, other government lands, tribal fee-to-trust lands, and land held in fee. Fee lands largely dominate the area.



of an Indian reservation. This region has not been considered a reservation by the general populace.[13] As Justice O'Connor wrote, "a contrary conclusion would seriously disrupt the justifiable expectations of people living in the area." *Hagen*, 510 US at 421, 114 SCt at 970, 127 LEd2d at 271.[14]

[¶31.] For over one hundred years, federal and state authorities have treated the Yankton Sioux Reservation as diminished. By agreement of tribal members and an Act of Congress, all unallotted reservation lands were sold to the United States and opened for settlement in 1895. The United States Supreme Court in 1914 referred to the very area now in question as no longer part of the reservation, and, in four separate decisions, this Court concluded

---

[13] Even though *Perrin* cannot be considered *res judicata* as it did not specifically deal with diminishment, certainly its import created considerable reliance.

> If lower courts felt free to limit Supreme Court opinions precisely to the facts of each case, then our system of jurisprudence would be in shambles, with litigants, lawyers, and legislators left to grope aimlessly for some semblance of reliable guidance.

McCoy v. Massachusetts Inst. of Technology, 950 F2d 13, 19 (1stCir 1991), *cert. denied*, 504 US 910, 112 SCt 1939, 118 LEd2d 545 (1992).

[14] Even the statutory county boundary descriptions refer to the "former Yankton-Sioux Indian reservation," and have since the South Dakota Code of 1939. *See* SDCL 7-1-5 (SDC 1939, § 12.0106)(Bon Homme county boundaries); SDCL 7-1-12 (SDC 1939, § 12.0113)(Charles Mix county boundaries); SDCL 7-1-22 (SDC 1939, § 12.0123)(Douglas county boundaries); SDCL 7-1-34 (SDC 1939, § 12.0135)(Hutchinson county boundaries).

diminishment occurred. Statutory language, contemporary negotiations, land ownership, population patterns and "jurisdictional history" all support diminishment. After more than a century, no other expectation is reasonable – using the Supreme Court's "clean analytical structure," the evidence is clear: the Yankton reservation has been diminished. South Dakota maintains jurisdiction in defendant's case.

[¶32.] *IV. Cross-examination on Prior Felony*

[¶33.] Defendant complains the trial court erred in allowing the prosecutor to ask him on cross-examination if he had ever been convicted of a felony. He alleges prejudice because he was yet to be tried as a habitual offender and his admission could have been used against him. Yet after his conviction on this charge, the State dismissed the habitual offender information. We therefore deem the matter moot. Hanson v. Hanson, 318 NW2d 355, 356 (SD 1982).

[¶34.] Affirmed.

[¶35] MILLER, Chief Justice, and SABERS, AMUNDSON, and GILBERTSON, Justices, concur.

# YANKTON SIOUX RESERVATION